

1 Tuesday, 31 October 2017
 2 (11.00 am)
 3 Submissions by MR GAMMIE
 4 LADY JUSTICE GLOSTER: Yes.
 5 MR GAMMIE: Good morning, my Lady. I appear this morning
 6 with my learned friend Ms Catherine Addy on behalf of
 7 Her Majesty's Revenue & Customs, and my learned friend
 8 Mr Gardiner and Mr Bayfield appear for the respondent
 9 administrators of Lehman Brothers International Europe.
 10 My Lady, I'll be absolutely honest with you, I won't
 11 say --
 12 LADY JUSTICE GLOSTER: That's refreshing!
 13 MR GAMMIE: I won't say that I'm a fish out of water, but
 14 I'm certainly a fish swimming in rather unfamiliar
 15 waters of the Insolvency Acts, and so if there are --
 16 LADY JUSTICE GLOSTER: We were under the impression this was
 17 a tax case, so --
 18 MR GAMMIE: My Lady, I'm very pleased to hear that you see
 19 it in that way, and indeed most of what I am going to
 20 says going to relate to tax. But I was going to say if
 21 there are any difficult questions of insolvency law that
 22 arise, I shall certainly defer to Ms Addy to deal with
 23 those.
 24 LORD JUSTICE DAVID RICHARDS: Are you a late substitute for
 25 Mr Goy?

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1 MR GAMMIE: Mr Goy has retired from practice.
 2 LORD JUSTICE PATTEN: Has he? We were told it's Mr Goy, but
 3 Mr Gammie --
 4 LADY JUSTICE GLOSTER: No, we're delighted to see you
 5 Mr Gammie, which is why when I looked at the little
 6 listing sheet, I thought that's somebody I know.
 7 Mr Goy --
 8 MR GAMMIE: My Lady, yes, Mr Goy retired at the end of March
 9 this year and so I was instructed to take his place.
 10 I obviously do not have the familiar knowledge of
 11 knowing exactly what was said or done below, but I'm
 12 sure many of my learned friends here will be able to
 13 assist you if there is any issue that arises about that.
 14 LADY JUSTICE GLOSTER: Well, take your own course. But
 15 speaking for myself, I think we're more concerned with
 16 tax issues at the moment and if you find there's a need
 17 to reply on a lot of insolvency issues raised by
 18 Mr Gardiner, then you will have an opportunity to do so
 19 in reply.
 20 MR GAMMIE: Yes. Thank you, my Lady.
 21 Well, my Lady, you have a core bundle and a number
 22 of other bundles, but I think the core bundle is what
 23 I will be going to mainly, along with the two bundles of
 24 authorities. Then there was an additional bundle of
 25 authorities that we sent down yesterday which it seemed

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1 to me would be useful, at least from your perspective,
 2 if not from ours, to have in one place all the various
 3 decisions that have been handed down in this matter,
 4 including the Court of Appeal's decision of last week,
 5 the most recent decision which resolves a number of the
 6 issues and which I must say I read with some relief in
 7 the sense that I think it clears the way for the tax in
 8 resolving a number of the other issues that might have
 9 arisen.
 10 Apart from our skeleton, my Lady, which is at
 11 tab 2 --
 12 LADY JUSTICE GLOSTER: Well, I have your list.
 13 MR GAMMIE: -- of the core bundle, there is also
 14 a supplemental skeleton that I think we served with your
 15 leave which I do not anticipate going to. The aim of it
 16 was to bring the court up-to-date with the developments
 17 that have occurred in the insolvency legislation,
 18 because the provisions that were looked at below and
 19 which obviously feature in other decisions, have been
 20 replaced in recent months.
 21 We don't say that that generates any difference in
 22 the tax issues that have to be argued about, but it at
 23 least ensures that we have a note of the most recent
 24 material.
 25 Then there was a very short note yesterday which

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1 just picked up on one slight oversight in that earlier
 2 skeleton argument in relation to an amendment that had
 3 been made more recently by --
 4 LADY JUSTICE GLOSTER: Yes.
 5 MR GAMMIE: -- I am just looking at -- it's a Small Business
 6 Enterprise and Employment Act 2015.
 7 LORD JUSTICE PATTEN: This is a document headed "Minor
 8 correction to HMRC's supplemental skeleton argument".
 9 MR GAMMIE: It is, my Lord, and it doesn't make any
 10 difference at all to the issues that we need to address
 11 but it ensures that the supplemental skeleton argument
 12 is absolutely correct in at least noting that change
 13 that has been made by the Small Business Enterprise and
 14 Employment Act.
 15 I have to say being more used to tax legislation,
 16 one tends to think that you live in a world where things
 17 always change. I'm rapidly finding out that much the
 18 same occurs in other areas such as insolvency and small
 19 business and the like.
 20 LADY JUSTICE GLOSTER: We're getting a transcript, are we?
 21 MR GAMMIE: I believe so.
 22 LADY JUSTICE GLOSTER: Yes, thank you.
 23 MR GAMMIE: Yes. Yes, my Lady, we are.
 24 My Lady, I don't know how much material you've had
 25 the opportunity to read in advance. I have to say my

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<p>1 learned friend Mr Goy, who did write the skeleton 2 argument on behalf of the Commissioners, I think set out 3 everything in commendably straightforward terms. 4 I don't anticipate going through that line by line or 5 paragraph by paragraph, but where I thought I would 6 start would be to take up a suggestion that my learned 7 friend made in his skeleton in the sense that at 8 paragraph 30 in his skeleton, he said -- and put it in 9 bold: 10 "Rather it is the legislator's intention in creating 11 the statutory right that is relevant, the matter is 12 accordingly to be determined by reference to the 13 characteristics of the rights as discerned by the 14 legislation which characteristics are in the context of 15 statutory interest clear from the wording of the rule 16 and have accurately been described by [Mr Justice David 17 Richards as he was then] in Waterfall IIA." 18 And we may go to that particular passage of that 19 particular decision in due course, but it seemed to me 20 that the right place to start for this before we 21 consider the tax is actually to identify and be clear 22 about what the creature, the payment, the statutory 23 right, we're actually dealing with. That is usefully 24 dealt with in most of the decisions that have already 25 been made in this case, and most particularly the</p> <p style="text-align: center;">Page 5</p>	<p>1 rank equally. 2 9. The rate of interest payable under paragraph 7 3 is whichever is the greater of the rates specified under 4 paragraph 6 or the rate applicable to the debt apart 5 from the administration." 6 Just going back to paragraph 6, that tells us that 7 rate of interest to be claimed is the rate specified in 8 section 17 of the Judgments Act 1838 on the date when 9 the company entered administration. 10 So that is effectively the statutory regime we're 11 looking at and has been the subject of various elements 12 of the decisions that have already been reached in this 13 matter, and I'll elaborate them under eight or nine 14 headings. My first point in relation to the statutory 15 regime is that it provides a complete statutory code for 16 the award of statutory interest on proved debts. So 17 everything one needs to know about the right is to be 18 found in those rules. 19 I don't think I need take you to it necessarily, but 20 that is apparent from the Court of Appeal's decision 21 last week in paragraphs -- 22 LADY JUSTICE GLOSTER: Yes, that's our decision. 23 MR GAMMIE: Indeed my Lady -- paragraphs 25 to 30 following 24 on from the Supreme Court's analysis earlier this year. 25 As a consequence of that, one of the issues that was</p> <p style="text-align: center;">Page 7</p>
<p>1 Court of Appeal's decision of last week, and they 2 surround -- a statutory regime is in Insolvency 3 Rule 2.88, which is in the first authorities bundle at 4 tab 23, now found in Insolvency Rule 14.23 as we say in 5 our supplemental skeleton, but I will continue to refer 6 to 2.88. 7 LADY JUSTICE GLOSTER: What tab are we in? 8 MR GAMMIE: It's tab 23 of the first authorities bundle, and 9 page 26 at the bottom. I am sure this will all be 10 extremely familiar, certainly to Lord Justice David 11 Richards, but 2.88, if I can just refresh your mind in 12 paragraph 1: 13 "Where a debt proved in the ...(Reading to the 14 words)... that interest is provable as part of the debt 15 except insofar as it is payable in respect of any period 16 after the company entered into administration." 17 Then I think we can go straight down to paragraph 7 18 which is the start of the three main paragraphs: 19 "Any surplus remaining after payment of the debts 20 proved shall before being applied for any purpose be 21 applied in paying interest on those debts in respect of 22 the periods during which they had been outstanding since 23 the company entered administration. 24 8. All interest payable under paragraph 7 ranks 25 equally whether or not the debts on which it is payable</p> <p style="text-align: center;">Page 6</p>	<p>1 much debated in other hearings, the rule in 2 Bower v Marris does not apply because the language of 3 those rules, the rules in 2.88, is inconsistent with at 4 the application of that principle. That we can see in 5 particular in the decision, which if one goes to the 6 supplementary appeal bundle and tab 1, the decision in 7 Waterfall IIA on 31 July 2015. In particular, one can 8 go through to pages 50, 52 -- 9 LORD JUSTICE PATTEN: Sorry, where in the bundle is it, 10 Mr Gammie? 11 MR GAMMIE: I was looking at the supplemental bundle we sent 12 yesterday. It's headed "HMRC's supplemental bundle of 13 authorities". 14 LORD JUSTICE PATTEN: Tab? 15 MR GAMMIE: Tab 1, and in particular this is subject to 16 extensive discussion by my Lord Justice David Richards. 17 LADY JUSTICE GLOSTER: You can assume at least some sort of 18 familiarity with these -- 19 MR GAMMIE: I have taken the liberty of assuming that, but 20 in particular I was just going to draw attention at 21 paragraph 145 on page 50. The point is made that the 22 rule in Bower v Marris in particular applies where there 23 are two debts payable by the estate to the creditor. So 24 in Bower v Marris, there is both an obligation to repay 25 the principle and an obligation in respect of interest,</p> <p style="text-align: center;">Page 8</p>

<p>1 which is the foundation of the ability of the creditor 2 to choose whether he is allocating the payment to 3 interest or to the principal. 4 Then over the page at page 51, starting at 5 paragraph 149, these are sidelined. So at the beginning 6 of paragraph 149, it is said: 7 "The right to interest arising out of a surplus 8 under rule 2.88 is not a right to the payment of 9 interest accruing due from time to time during the 10 period between the commencement of the administration 11 and the payment of the dividend or dividends on the 12 proved debts. Dividends cannot be appropriated 13 ...(Reading to the words)... under rule 2.88 because at 14 the date of the dividends no interest was payable at 15 that time. Pursuant to rule 2.88, entitlement under 16 rule 2.88 to interest is only a purely statutory 17 entitlement arising once there is a surplus and payable 18 only out of that surplus." 19 So that is the foundation of the analysis that 20 concludes that Bower v Marris isn't applicable in 21 relation to the calculation of interest under the 22 statutory rule. Following on from that, we can just 23 look down the page and they are sidelined. For example, 24 at paragraph 152, it's said: 25 "The purpose behind" --</p> <p style="text-align: center;">Page 9</p>	<p>1 of interest under rule 2.8, but also that the principle 2 itself is to be modified to fit in with the regime 3 created by rule 2.88. As will already be apparent, I do 4 not accept that the regime created by rule 2.88 leaves 5 room for the application of the principle in 6 Bower v Marris." 7 LADY JUSTICE GLOSTER: What is said against you is the fact 8 that Mr Justice Richards, as he then was, didn't accept 9 the submission that the right to interest is treated as 10 having accrued during the relevant period, that means it 11 can't be annual interest. 12 MR Gammie: That is certainly one of my learned friend's 13 arguments. I read the whole paragraph because I think 14 it's important to see that what is said there is said in 15 the context of considering the rule in Bower v Marris so 16 you can understand why, if that principle has to work on 17 the basis that there is an outstanding debt as is said 18 in paragraph 145, both the principal and interest at the 19 same time that payment is made so that it can be 20 allocated, that is the context within which 21 My Lord Justice addressed that particular point. 22 I think it has been said and accepted by my learned 23 friends on the other side that the right to interest 24 which arises under 2.88, apart from being a complete 25 statutory code, is essentially a payment of interest,</p> <p style="text-align: center;">Page 11</p>
<p>1 LADY JUSTICE GLOSTER: We can read that. 2 MR Gammie: -- "the introduction of the new regime 3 ...(Reading to the words)... is to introduce 4 a straightforward regime and payment of such interest." 5 LADY JUSTICE GLOSTER: And this court has upheld that 6 approach. 7 MR Gammie: Indeed, my Lady. Then at paragraph 154, which 8 I think is the paragraph my learned friend relies on to 9 some extent and was influential below in this case. 10 Mr Dicker submitted that: 11 "The principle in Bower v Marris was more 12 fundamental than simply requiring payment on account to 13 be treated ...(Reading to the words)... payable at the 14 date of those payments. It was, he submitted, intended 15 to reflect an underlying principle that in insolvency 16 creditor should not be prejudiced by the late payment of 17 their debts. The statutory right to interest arising 18 under rule 2.88 can be regarded with hindsight as having 19 accrued on a day-to-day basis since the commencement of 20 the insolvency process, albeit contingently on there 21 being an ultimate surplus. Once the event occurs, the 22 right to interest is treated as having accrued during 23 the relevant period. I do not accept this submission. 24 It involves saying not only that the principle in Bower 25 v Marris is to be applied to the calculation and payment</p> <p style="text-align: center;">Page 10</p>	<p>1 which is sui generis. In other words it is something of 2 its own kind to be considered in the context of course 3 of the tax statutory language, but which if one cannot 4 find precise precedence in the tax case law, that is 5 unsurprising, given the fact that it is a statutory 6 creation and a right of its own kind. 7 So that's my first point in relation to the 8 statutory regime; we're looking at something entirely 9 separate. 10 LADY JUSTICE GLOSTER: I don't think this court addressed 11 the point or dealt with the issue as to whether it 12 accrued during the relevant period, did they? 13 MR Gammie: No, you didn't, my Lady. 14 LADY JUSTICE GLOSTER: Just looking at, I don't know, 15 paragraph 27 of our judgment -- 16 MR Gammie: Which is at tab 5 in the same bundle, my Lady. 17 You of course endorsed the reasoning and the conclusion 18 in relation to Bower v Marris, but you did not allude 19 specifically to what had been said in paragraph 154. 20 So -- 21 LADY JUSTICE GLOSTER: This court did it on the basis that 22 it was a simple and complete statutory code without 23 considering whether or not it was relevant to decide 24 whether the right is treated as having accrued during 25 the relevant period.</p> <p style="text-align: center;">Page 12</p>

<p>1 MR GAMMIE: Well, my Lady, that's true --</p> <p>2 LADY JUSTICE GLOSTER: Is that right?</p> <p>3 MR GAMMIE: -- in the sense that you don't go through the</p> <p>4 same analysis as my Lord David Richards did, but on the</p> <p>5 basis that you endorsed his conclusion and reached the</p> <p>6 same conclusion, then I think you say you essentially</p> <p>7 accept his reasoning. I think the basis upon which</p> <p>8 presumably this court concluded that <i>Bower v Marris</i></p> <p>9 didn't arise was the same one that essentially there</p> <p>10 wasn't both a right to the interest and principal at the</p> <p>11 same time as the payments are made. So I don't think</p> <p>12 there's anything I had detected in this court's decision</p> <p>13 last week which casts doubt on how my Lord had reached</p> <p>14 his conclusion when he was sitting below.</p> <p>15 My second point which really again derives from the</p> <p>16 previous cases concerning this matter is that the</p> <p>17 original debts are discharged and replaced by the debts</p> <p>18 which are proved as part of the statutory process of</p> <p>19 administration. So it is a situation where the previous</p> <p>20 debts do not survive, they only survive when we get to</p> <p>21 the question of the calculation of the rate of interest</p> <p>22 on the debts that are proved --</p> <p>23 LADY JUSTICE GLOSTER: This is the respondents' submission.</p> <p>24 Sorry, you prefaced this submission by saying this was</p> <p>25 the respondents' submission.</p> <p style="text-align: center;">Page 13</p>	<p>1 The original debts --</p> <p>2 LORD JUSTICE PATTEN: They don't survive.</p> <p>3 MR GAMMIE: -- they don't survive. What replaces them are</p> <p>4 the debts that are proved and the interest is calculated</p> <p>5 by reference to the debts that are proved in the</p> <p>6 administration, as part of the statutory process of</p> <p>7 administration.</p> <p>8 My Lord, if I can just branch out slightly and</p> <p>9 anticipate from the tax perspective of what that means,</p> <p>10 of course the debts which exist at the point at which</p> <p>11 the company goes into administration and which then have</p> <p>12 to be proved in the administration may give rise to</p> <p>13 interest, either short interest, yearly interest. There</p> <p>14 may be a whole mixture of different types of interest,</p> <p>15 but of course that doesn't matter because those original</p> <p>16 debts -- I call them "original debts" -- are discharged</p> <p>17 and replaced by the amount that the creditor proves in</p> <p>18 the administration.</p> <p>19 So what one is looking at is the interest which is</p> <p>20 calculated by reference to the amount which has been</p> <p>21 admitted as a proved debt in the --</p> <p>22 LADY JUSTICE GLOSTER: Why is that a plus point in your</p> <p>23 favour so far as this yearly interest --</p> <p>24 MR GAMMIE: My Lady, I'm not at the moment making points</p> <p>25 which are necessarily pluses or minuses in my favour.</p> <p style="text-align: center;">Page 15</p>
<p>1 MR GAMMIE: No --</p> <p>2 LADY JUSTICE GLOSTER: This your submission?</p> <p>3 MR GAMMIE: -- this is my second point in relation to the</p> <p>4 statutory regime. My Lady, I am trying to define what</p> <p>5 it is we're looking at to which we then have to apply</p> <p>6 the tax principles to decide what type of interest,</p> <p>7 whether it's yearly interest or not.</p> <p>8 So of course when you're talking about interest,</p> <p>9 you're normally talking about a principal sum by</p> <p>10 reference to which interest or the sum of interest is</p> <p>11 going to be calculated. So insofar as we're talking</p> <p>12 here about the calculation of an amount of interest that</p> <p>13 is going to be paid, it's not a calculation which is</p> <p>14 performed by reference to the original debts. That's my</p> <p>15 submission, because those debts we've told by the</p> <p>16 previous decisions have effectively been discharged by</p> <p>17 the proving of the debts in the administration.</p> <p>18 That is reflective of a principle --</p> <p>19 LORD JUSTICE PATTEN: I'm sorry, I'm not quite following,</p> <p>20 Mr Gammie. When you say it's not calculated by</p> <p>21 reference to the provable debts, it clearly is</p> <p>22 calculated by reference to the provable debts in terms</p> <p>23 of working out how much interest is payable.</p> <p>24 MR GAMMIE: My Lord, if I said it wasn't calculated by</p> <p>25 reference to that, then that was not my intention.</p> <p style="text-align: center;">Page 14</p>	<p>1 I am defining what the nature of the right and the</p> <p>2 interest is so I can then come on and see how the tax</p> <p>3 legislation applies to that particular right. It</p> <p>4 doesn't matter what type of interest the original debts</p> <p>5 carried, what we're looking at is an amount of interest</p> <p>6 which is being calculated by reference to the debts that</p> <p>7 are proved.</p> <p>8 As we'll see, those original debts are relevant when</p> <p>9 one comes to look at what rate of interest the proved</p> <p>10 debts may carry, but the original debts have effectively</p> <p>11 been discharged.</p> <p>12 LADY JUSTICE GLOSTER: You are looking at the rate on the</p> <p>13 original debt under sub-rule 9, aren't you?</p> <p>14 MR GAMMIE: When we get to that, my Lady, we'll see what we</p> <p>15 are looking at in relation to that.</p> <p>16 LADY JUSTICE GLOSTER: Why aren't we looking at the original</p> <p>17 debt? It says so.</p> <p>18 MR GAMMIE: My Lady, I wasn't saying that we weren't looking</p> <p>19 at it; I was saying that when we get to it, we'll see</p> <p>20 what exactly it is that you do look at for those</p> <p>21 purposes.</p> <p>22 LADY JUSTICE GLOSTER: Mm.</p> <p>23 MR GAMMIE: So basically speaking, it's the amounts that are</p> <p>24 proved which is going to be the principal amount on</p> <p>25 which the interest at whichever is the appropriate rate</p> <p style="text-align: center;">Page 16</p>

<p>1 is calculated. And if there is a qualification to that 2 which emerges from the decisions below, it is that as 3 part of the administration procedure, if you are dealing 4 with things like contingent or future debts, it may be 5 that you can revise your proof if the contingency, for 6 example, has occurred before there is a distribution in 7 relation to that debt.</p> <p>8 So the debt proved is the amount to which the 9 creditor is regarded as entitled at the date at which 10 the company goes into administration. But in reality, 11 he's only going to receive the sum that's due to him -- 12 so his debt that's been proved -- at some later time.</p> <p>13 The principle, as I understand it, of insolvency law 14 from reading the decisions below is that you work on the 15 basis that the assets are realised and distributed among 16 the creditors according to their entitlements at the 17 date at which the administration commences. That's as 18 I understand it the underlying theory. But of course, 19 what you are looking at is a circumstance where that's 20 only going to be paid much later as the administration 21 proceeds and as it proceeds in accordance with the 22 statutory procedure for the administration.</p> <p>23 So whilst that doesn't prevent an adjustment in 24 respect of contingent or future debts, that adjustment 25 which occurs effectively goes back to the date of the</p> <p style="text-align: center;">Page 17</p>	<p>1 We can see that in the Court of Appeal's decision of 2 last week, for example, as to how it's looked at. If we 3 go to the fifth tab of the supplementary bundle, 4 paragraph 51 of the Court of Appeal's decision last week 5 where it's a summary of the reasons given by 6 Lord Justice David Richards below. So item B is that 7 creditors are compensated by the payment of statutory 8 instrument for the delay in payment of their proved 9 debts from the date of administration, not their 10 underlying claims.</p> <p>11 And similarly in paragraph 57 of the 12 Court of Appeal's decision, it's said:</p> <p>13 "More fundamentally we agree with the principal 14 basis for the judge's analysis which treats the debts as 15 the provable ...(Reading to the words)... on account of 16 provable debts having to be paid after, sometimes long 17 after, that cut-off date and does not depend upon there 18 being any right to interest under the underlying claim 19 even though the rate of interest may do."</p> <p>20 So what we're looking at is true interest, interest 21 usually being defined certainly or talked about for tax 22 purposes as payment by time for the use of money or for 23 being out of one's money for a particular period of 24 time.</p> <p>25 We can see from that same passage in the</p> <p style="text-align: center;">Page 19</p>
<p>1 administration to provide the sum in respect of which 2 the principal amount in respect of which interest is 3 going to be calculated --</p> <p>4 LORD JUSTICE PATTEN: Well, it all turns on sub 7 doesn't 5 it? I mean, the surplus after payment of the debts 6 proved shall, et cetera, be applied in paying interest 7 on those debts. I mean, you're not making any -- or are 8 you making any other point than that?</p> <p>9 MR GAMMIE: No, my Lord, I am probably making in a rather 10 long-winded way just that point.</p> <p>11 LORD JUSTICE PATTEN: So the focus and indeed the obligation 12 to apply the surplus in paying interest is geared to the 13 debts that are being proved in the liquidation or 14 administration.</p> <p>15 MR GAMMIE: Indeed, my Lord, including any adjustment that 16 is made to contingent or future debts.</p> <p>17 So the statutory interest that is provided for in 18 paragraph 7 of the rule recognises that in practice 19 creditors are not going to be paid out on the date the 20 administration commences, but at some later time, and 21 provided that there are sufficient assets -- in other 22 words provided there is a surplus -- and that is 23 therefore performing the usual function of interest of 24 compensating the creditors for being out of their money 25 for a period of time.</p> <p style="text-align: center;">Page 18</p>	<p>1 Court of Appeal's decision that interest is paid on 2 contingent and future debts under this rule, again from 3 the date of commencement of the administration and not 4 from the date of the occurrence of some later 5 contingency or future satisfaction of a condition.</p> <p>6 Of course, to that extent, it might be said that the 7 interest doesn't truly represent the time value of money 8 because it's effectively going back to an earlier time 9 than, for example, the contingency was originally 10 satisfied. But that's because the creditor can and will 11 prove for his contingent or future debt as at the date 12 of the commencement of administration. The values 13 ascribed to those debts are calculated in accordance 14 with the insolvency rules, and those rules allow the 15 amount that can be proved to be adjusted to take account 16 of that later event in terms of the contingency or 17 future condition.</p> <p>18 So it is still compensation for being kept out of 19 money for which the creditors were entitled to prove, 20 even though the proof is adjusted during the course of 21 the administration.</p> <p>22 That then raises the question of what is the nature 23 of the right to interest? It's obviously a right which 24 can only arise in terms of an entitlement to payment at 25 a point at which a surplus emerges, so that as we've</p> <p style="text-align: center;">Page 20</p>

<p>1 seen the statutory interest doesn't accrue in the usual 2 sense because of that contingency. It was actually 3 described as akin to a contingency or something like 4 that in a case which my Lord David Richards referred to 5 in his decision in Waterfall IIA, which again is at 6 tab 1 of the supplemental bundle, paragraph 125 on 7 page 44. 8 We see at paragraph 125 this is citing from a case 9 called Attorney General of Canada v Confederation Trust 10 Co. So Blair RSJ held that: 11 "Section 95(ii) applied to the proper disposal 12 ...(Reading to the words)... notwithstanding it had not 13 come into force after the commencement of the 14 liquidation." 15 This is not of course relevant to the present issue, 16 but it is worth noting a passage from that part of his 17 judgment dealing with this issue at paragraph 25: 18 "To say this is not to give the provision 19 retroactive effect. Although it is not free from doubt, 20 I do not accept the contention that the claimants 21 ...(Reading to the words)... in my opinion, they 22 acquired at best the contingent right to payment of 23 post-liquidation interest conditional on there being 24 a surplus in the liquidated estate after payment of all 25 the company's debts and obligations and of the costs</p> <p style="text-align: center;">Page 21</p>	<p>1 the start of the period of the indebtedness? 2 MR Gammie: I do accept there's no accrual in the way you've 3 just described it, my Lord. As I will go on to 4 illustrate, one can of course have an amount that is 5 contingently payable which when the contingency is 6 satisfied is payable with interest over the period that 7 it's been outstanding. You might say that in the same 8 way, that interest does not accrue in the conventional 9 sense at a point at which the principal is only 10 contingently payable. 11 LORD JUSTICE Patten: Well, my Lord rejected Mr Dicker's 12 argument that there was a sort of contingent accrual as 13 part of his reasoning in the Waterfall case, as you've 14 just shown us. 15 MR Gammie: As part of the analysis in relation to 16 Bower v Marris, that is correct. 17 LORD JUSTICE Patten: In that sense, there isn't an accrual. 18 MR Gammie: No, no, my Lord, there isn't an accrual. But 19 if, for example, you had a contingent -- but I am saying 20 that that is not necessarily the only situation in which 21 you would not have an accrual in the conventional sense 22 that you have just described it, my Lord. Yet the 23 question we have to ask ourselves for tax purposes 24 is: is the absence of that conventional type of accrual 25 a key factor for deciding whether or not it's yearly</p> <p style="text-align: center;">Page 23</p>
<p>1 associated with the liquidation. The condition cannot 2 be determined and satisfied until the liquidation of the 3 estate is at least substantially completed." 4 So although it's a Canadian case, it's cited by 5 my Lord David Richards as at least a passage worth 6 noting. It describes the type of right to interest 7 we're talking about at a point prior to the emergence of 8 a surplus. Going back again now to the Court of Appeal 9 decision last week at tab 5, we can see about halfway 10 down in paragraph 27 the sentence: 11 "Thus the debts proved referred to in rule 2.88(7) 12 will include the whole of the ...(Reading to the 13 words)... all outstanding pre-administration interest. 14 The aggregate of those amounts will constitute the debt 15 upon which statutory instrument period since the onset 16 of the administration is payable. The requirement that 17 there should be a surplus out of which statutory 18 instrument is paid means that the aggregate of principal 19 and pre-administration interest will ...(Reading to the 20 words)... known figure ascertained during the course of 21 the administration prior to the calculation and payment 22 of any statutory interest." 23 So that's the type -- 24 LORD JUSTICE Patten: Do you accept there's no accrual in 25 the conventional sense of a debt bearing interest from</p> <p style="text-align: center;">Page 22</p>	<p>1 interest? 2 LORD JUSTICE Patten: Well, I mean, we've got to decide what 3 yearly interest means for tax purposes. But clearly the 4 word "interest", is used in the insolvency rules to 5 describe the payment which is made to compensate the 6 creditors for being kept out of their dividends. 7 MR Gammie: Indeed, my Lord, and it's not disputed in this 8 case that it is interest truly described. In other 9 words, it's not -- 10 LORD JUSTICE Patten: Well, I thought it was common ground 11 that statutory interest wasn't only interest as a matter 12 of ordinary speech but was interest within the meaning 13 of the word "interest" in the relevant provisions of the 14 Taxes Act. 15 MR Gammie: Indeed, my Lord, because I don't think there's 16 necessarily a distinction between what is generally 17 recognised as interest in the commercial world and what 18 is -- 19 LORD JUSTICE Patten: Right. So what does the word 20 "interest" mean? 21 MR Gammie: Payment by time for the use of money or to 22 compensate somebody for being out of their money for 23 a period of time. 24 LORD JUSTICE Patten: Right. So it's not dependent on it 25 being used to describe a compensatory payment which</p> <p style="text-align: center;">Page 24</p>

<p>1 accrues in the sense we've just been discussing. That's 2 not an essential component of it being interest. 3 MR GAMMIE: No, my Lord. 4 LORD JUSTICE PATTEN: So is the point about accrual then 5 only relevant to the word "yearly"? 6 MR GAMMIE: Well, you might have to ask my learned friend 7 his answer to that -- 8 LORD JUSTICE PATTEN: Well, I know, but I'm just seeing how 9 -- I mean, your argument presumably is that it isn't. 10 MR GAMMIE: I would say not, no. 11 LORD JUSTICE PATTEN: So what's your argument that it's (a) 12 interest which is agreed and it's yearly because 13 it covers a period of more than a year? 14 MR GAMMIE: Indeed, my Lord. 15 LORD JUSTICE PATTEN: It's as simple as that. 16 MR GAMMIE: It is indeed, my Lord, which is why I may not 17 take a great deal of your time this morning. But that 18 is essentially our case. 19 LADY JUSTICE GLOSTER: Don't you say also that it's 20 calculated by reference to a yearly rate? Or do you 21 think -- are you saying that doesn't matter? 22 MR GAMMIE: Well, I think my Lady is, as Goslings & Sharpe 23 illustrates, one of the cases that we can look at, you 24 may have interest which is calculated by reference to 25 a yearly rate but for a period shorter than year.</p> <p style="text-align: center;">Page 25</p>	<p>1 MR GAMMIE: There are of course tax cases which deal for 2 example with premiums and discounts where a debt is -- 3 well, discounts are always slightly tricky, let me just 4 take a premium as an example -- where an amount is 5 borrowed and it is repayable at a premium, and there 6 have been cases that have held that that is essentially 7 interest, the premium is in reality interest because 8 it's payment by time for the use of money. It's not 9 expressed at an annual rate but most of these things can 10 always be expressed as an annual rate of interest even 11 if in the document recording the loan it's just 12 expressed as a single sum. 13 LADY JUSTICE GLOSTER: But in order to recognise the 14 elephant that is yearly interest, what characteristics 15 do I have to look for? I mean, can you list them? 16 MR GAMMIE: Well, my Lady, I think we say that it's paid in 17 respect of a period greater than a year. There's always 18 been a question mark over if you have a payment that's 19 exactly a year, what is that, but I think it's generally 20 accepted that that is yearly interest. 21 LADY JUSTICE GLOSTER: But when you say "paid in respect 22 of", has the calculation got to be by reference to 23 a period of time? 24 MR GAMMIE: Well, interest is most normally calculated by 25 reference to time, because I think the authorities</p> <p style="text-align: center;">Page 27</p>
<p>1 Therefore, you wouldn't necessarily conclude that 2 because it's an amount outstanding for less than a year 3 and interest is paid in respect of less than a year that 4 it becomes yearly interest just because you describe the 5 interest in the yearly terms. 6 LADY JUSTICE GLOSTER: But if there is longer than a year, 7 isn't the rate to be -- yearly interest -- doesn't the 8 rate have to be calculated by reference to an annual 9 rate? 10 MR GAMMIE: Well -- 11 LADY JUSTICE GLOSTER: I mean, if you just said: okay, your 12 debt is a million, you are going to get -- everybody is 13 going to get 4 per cent on their debt irrespective of 14 how long it's been outstanding. 15 MR GAMMIE: Yes. So it's 4 per cent of the principal amount 16 that's been paid irrespective of whatever length of 17 time. 18 LADY JUSTICE GLOSTER: Yes. 19 MR GAMMIE: My Lady, that would potentially still be 20 interest, but you would express it as a different rate 21 according to -- if you wanted to express it as an annual 22 rate, it would obviously be a different rate for each of 23 the debts, depending on how long they've been 24 outstanding. 25 LADY JUSTICE GLOSTER: Yes.</p> <p style="text-align: center;">Page 26</p>	<p>1 describe it as payment by time for the use of money or 2 compensation being out of your money, and that is most 3 naturally expressed as being by reference to a period of 4 time. 5 Of course, you can in a particular loan instrument 6 express it as a lump sum which then has to be converted 7 into an annual rate if you want to convert it into 8 an annual rate, but it's something for which in 9 particular the obligation to pay on the principal amount 10 in respect of which it's outstanding is expected or does 11 last for more than a year, because it's the existence of 12 the principal amount by reference to which the 13 compensation that is interest is going to be calculated 14 to arrive at your figure of interest. 15 LADY JUSTICE GLOSTER: But if for example the so-called 16 return is not defined by reference to the period during 17 which it's outstanding but defined by reference to the 18 profits which the borrower have made on the loan in 19 a particular period since he took out the loan, does 20 that qualify as interest? Because in some loan 21 instruments, there isn't interest payable at all, but 22 there's another form of reward that may not be, as it 23 were, calculated expressly by reference to a period of 24 time but is a payment for the use of the money that 25 is -- I am thinking of interest under a sharia -- not</p> <p style="text-align: center;">Page 28</p>

<p>1 interest, return payable under a sharia-compliant loan 2 instrument. 3 MR Gammie: Well, of course the whole objective of Islamic 4 finance of one sort or another is to be able to 5 construct a series of payments which are not described 6 as interest or not recognised as interest. And of 7 course for tax purposes, there are specific legislative 8 provisions to try and deal with some of these things 9 from a general perspective without maybe bringing in 10 sharia finance as a complicating factor. If in the 11 circumstances you describe, so for example money is 12 lent on terms that the amount that is going to be paid 13 for the use of that money is dependent upon the profits 14 which are generated -- 15 LADY JUSTICE GLOSTER: Or the increase in value of the 16 property which has been purchased. 17 MR Gammie: Indeed. Then as an ordinary matter, I would say 18 that was interest, but of course for tax purposes you 19 can get in -- when I say into deep water -- you can get 20 into a lot of other statutory provisions. For example, 21 if you are talking about a company that issues a debt 22 where the interest is dependent upon the results of the 23 company, that will usually be treated as a dividend 24 rather than as interest for tax purposes. 25 So there you are straying into areas where the way</p> <p style="text-align: center;">Page 29</p>	<p>1 money at your bank on an ordinary deposit account and it 2 remains outstanding for more than a year, it's not 3 generally been regarded that the interest that the bank 4 is crediting to your deposit account is yearly interest 5 in the conventional sense. 6 Now one of the problems with banks is that banks, 7 because money is their commodity, they are always 8 treated rather differently. But if we're talking about 9 a situation -- 10 LADY JUSTICE GLOSTER: So I leave a pathetic amount of money 11 in a deposit account and I get a pathetic rate of 12 interest on it and it sits there for a year, that's not 13 yearly interest, even though the bank will say to me I'm 14 going to give you 1 per cent per annum on this deposit 15 or less -- 16 MR Gammie: My Lady, one reason for that is -- well, let's 17 think to the prospect that the Bank of England might 18 increase the rate this week -- 19 LADY JUSTICE GLOSTER: Right. 20 MR Gammie: -- but let's think back to earlier times when 21 the rates were more substantial. One reason that has 22 been given in a case called Garston Overseers by 23 Mr Justice Rowlatt is because effectively you can 24 withdraw that money at any time so therefore it's 25 effectively a balance which is here today and could be</p> <p style="text-align: center;">Page 31</p>
<p>1 in which -- I mean, you know so many different payments 2 as a commercial matter can be described as equivalent to 3 interest as a particular rate. Then of course the tax 4 system has to deal with that by deciding either that it 5 is interest and will be taxed as interest, or to the 6 extent that the character of the transaction takes it 7 out of the category of interest and gives it some other 8 income description for tax purposes, you've got to 9 decide whether you have special legislation to deal with 10 it. And I have to say we have hundreds of pages of 11 legislation dealing with just that sort of thing. 12 LADY JUSTICE GLOSTER: But here it's common ground it's 13 interest. 14 MR Gammie: But here it's common ground it is interest, my 15 Lady, yes. 16 LADY JUSTICE GLOSTER: It's a return based on the time -- or 17 you say it's based on the period of time during which 18 the money has been outstanding. 19 MR Gammie: Indeed. Because that's -- 20 LADY JUSTICE GLOSTER: You say the only thing one needs to 21 add to that once it's interest is the fact that it's 22 been outstanding for longer than a year and make it 23 yearly interest. 24 MR Gammie: Yes, essentially. I have to say "essentially" 25 because there are -- for example, if you deposit some</p> <p style="text-align: center;">Page 30</p>	<p>1 gone tomorrow, the mere fact that you choose to leave it 2 there for tomorrow and for several more tomorrows 3 doesn't convert the interest into something that is 4 ordinarily regarded as yearly interest. 5 LADY JUSTICE GLOSTER: You are not saying we shouldn't 6 follow that? 7 MR Gammie: I am saying that's not the situation we have 8 here. The type of situation we're looking at is 9 a situation where there is a sum that is due that is 10 outstanding over an extended period of time, not because 11 you can turn up and demand payment immediately or 12 withdraw the balance of your amount, but because you 13 effectively have to await the statutory processes which 14 have to be gone through until a surplus emerges which 15 then gives rise to your statutory entitlement. That 16 statutory entitlement is then calculated by reference to 17 a period of time which is going to be considerably 18 longer than a year. 19 LORD JUSTICE PATTEN: The Judgments Act -- which is one of 20 the two possible rates, and in this case the appropriate 21 rate because it's 8 per cent -- fixes the amount in the 22 relevant section, section 17, as 8 per cent per annum. 23 So going back to the first question my Lady asked you, 24 you don't seem to be saying, or do you, that that is 25 conclusive in itself?</p> <p style="text-align: center;">Page 32</p>

1 MR Gammie: No, my Lord. I mean, the mere fact that a rate
 2 of interest is expressed as an annual rate I don't think
 3 I could say was the be all and end all of it.
 4 LORD Justice Patten: Well, let's take an example. Let's
 5 assume the administration lasts six months so you get
 6 the statutory interest at the end of six months rather
 7 than a year. But by reference to the Judgments Act rate
 8 which is a per annum rate, is the Revenue's position
 9 that that would not be yearly interest?
 10 MR Gammie: My Lord, my understanding is that below it was
 11 accepted that would not be yearly interest because the
 12 principal amount that is paid and in respect of which
 13 calculation is made is less than a year.
 14 LORD Justice Patten: If you put money on an overnight
 15 deposit on a per diem rate but in fact you left it in
 16 the deposit for over a year, would that be yearly
 17 interest?
 18 MR Gammie: Well, my Lord, I think the answer to that is it
 19 would depend. You would have to enquire more closely
 20 into the basis upon which this money was being
 21 deposited. The illustration I gave my Lady before was a
 22 straightforward bank deposit which is withdrawable as
 23 and when you need the funds, it just so happens you
 24 leave it there, but you might need to enquire as to
 25 whether that was the nature of the --

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1 LORD Justice Patten: Well, that is going to be true of any
 2 bank deposit. I mean, a conventional deposit, you leave
 3 it there for as long as you like.
 4 MR Gammie: Well, indeed. But of course you can
 5 deliberately put money on deposit with a bank for
 6 a specified period of time for a year or two years.
 7 LORD Justice Patten: You can do, but let's assume it's more
 8 open-ended than that. There is an authority where the
 9 loan was in terms for a period of less than a year as we
 10 know. But let's assume it's open-ended and it's just
 11 put on a deposit which bears whatever is the prevailing
 12 rate of interest but in fact it lasts for more than
 13 a year or less than year. I mean, is that what
 14 determines whether it's yearly interest?
 15 MR Gammie: I think if you go to cases like
 16 *Corinthian Securities v Cato*, they say you would have to
 17 enquire into what was the intention behind this. For
 18 example, you might be buying a house and taking out
 19 a mortgage which then you sell the house and repay the
 20 mortgage within six months, but authority would suggest
 21 that because mortgage interest is normally treated as
 22 yearly interest, the fact that you happen to have sold
 23 the house within six months and repaid the mortgage
 24 wouldn't necessarily deprive the interest of its
 25 character. But I think there's an important element to

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1 this that we should note: if you are talking about -- so
 2 supposing -- if we're talking about payment of interest
 3 now in respect of a loan which is going to have what's
 4 called a future tract of time, you are having to decide
 5 now by reference to the payment you are making as to
 6 whether that interest satisfies or has the quality of
 7 yearly interest looking forward.
 8 But we're not in that situation, we're in
 9 a situation where you are looking back and you can see
 10 the period of time over which the amount, the principal
 11 in which respect of interest is calculated, has been
 12 outstanding.
 13 LORD Justice Patten: Well, I'm not sure about that.
 14 I mean, I see what you are saying about our case because
 15 at the time when the administration is all but complete
 16 and it's clear there is going to be a surplus, the
 17 administrators can then calculate what is due by
 18 reference to the relevant period, which in this case was
 19 more than year. But in an ordinary case of a continuing
 20 loan, for example, when the company or whoever it is,
 21 whoever the payer is, comes to make up his tax returns
 22 which are done on an annual basis, he is going to know
 23 as of the making of the return for what period of time
 24 the interest has been payable, isn't he?
 25 MR Gammie: Well, my Lord, yes, but the point here is that

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1 you have to know when you make the payment.
 2 LORD Justice Patten: Yes.
 3 MR Gammie: So it's not when you make up your return at the
 4 end of the day, your tax return. Because the obligation
 5 to withhold, if it's an obligation to withhold on yearly
 6 interest, has to be exercised at the time at which you
 7 make the payment. So you have to know -- that's one of
 8 the essences of the whole scheme of things, because --
 9 LORD Justice Patten: So it should be on that view
 10 recognisable ab initio at the outset?
 11 MR Gammie: Well, it should certainly be recognisable at the
 12 time at which you first come to make a payment. And of
 13 course if you borrow money, you are frequently not going
 14 to be paying interest for a period of a year. What you
 15 are going to be paying frequently is interest for
 16 a monthly, quarterly or half-yearly period.
 17 So the fact that you are making a payment of
 18 interest that covers, that has accrued for less than
 19 a year is not what determines whether or not it's yearly
 20 interest, because otherwise very few payments of
 21 interest would ever be yearly interest because you would
 22 make sure they were always paid six-monthly. So it has
 23 to be some aspect of the loan or the principal amount in
 24 respect of which the interest is paid. And if you are
 25 looking forward, it's asking yourself whether as

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<p>1 a matter of commercial practice, terms of the loan, or 2 whatever, it has a future tract of time which provides 3 the interest with that character as yearly interest. 4 But of course when you are looking at a surplus that 5 emerges under the statutory regime, you are not looking 6 to the future at all, you are looking to the past. You 7 can see exactly how long the payment -- as the 8 administration has lasted, the payment is how much it's 9 compensating the creditor for being out of his money and 10 for the period of the administration. 11 LORD JUSTICE PATTEN: But can I be clear then -- I mean, 12 obviously I understand that-- but are you saying the 13 criteria of determining whether it's yearly interest are 14 different as between the conventional loan situation 15 you've just described, the first of your examples where 16 one needs to know at the date of payment whether tax is 17 deductible or not, and the present case, our case, where 18 you are doing an ex post facto calculation at the end of 19 the -- 20 MR GAMMIE: No, I'm not saying the criteria are different. 21 I'm saying that in relation to an ex post payment such 22 as we have under the statutory regime, you can see 23 immediately that the criteria are satisfied. That's not 24 to say the criteria are different when you are looking 25 at a payment of interest now in respect of an amount</p> <p style="text-align: center;">Page 37</p>	<p>1 hindsight how long the period is. But in both those 2 examples, it is the period which is the critical factor 3 in all this. 4 MR GAMMIE: It is, because generally speaking if something 5 is short, less -- if the obligation is going to survive 6 or is expected to survive less than a year, then you 7 wouldn't normally be looking at yearly interest. 8 LORD JUSTICE PATTEN: Yes. 9 MR GAMMIE: Of course -- 10 LORD JUSTICE PATTEN: It's got nothing therefore to do with 11 accrual. 12 MR GAMMIE: Well, as I say, my Lord, when we talk in terms 13 of accrual, I think what we're talking about is accruing 14 in the sense of there is an amount that is arising 15 day-by-day even though it's not immediately payable. 16 But of course accrual can also be thought about in terms 17 of just saying, "The obligation arose this time last 18 year, I'm now entitled to an amount of interest, what's 19 the calculation of interest over that period?" 20 You've calculated by reference to a period of time 21 which could equally be talked about in terms of accrual. 22 LADY JUSTICE GLOSTER: Hasn't it got to be -- going back to 23 the rate point, and I am really kind of focusing on 24 Bebb v Bunny, hasn't one got to say well, 25 the calculation of the interest is by reference to</p> <p style="text-align: center;">Page 39</p>
<p>1 which has not been outstanding for a year or where you 2 actually have to ask yourself: is this the type of debt 3 obligation giving rise to this interest which means that 4 this is yearly interest? 5 Because there you can't -- so if I borrow money now 6 and I have to pay in a month's time the first tranche of 7 interest, I won't know just by reference to the time 8 that the debt has been outstanding and the period that's 9 covered by the interest I am paying, I won't be able to 10 answer the question straightforwardly: is this yearly 11 interest? So you obviously have to enquire into what, 12 you know, what have I borrowed the money for? What are 13 the facets of this transaction giving rise to interest 14 which confer upon it the character of yearly interest? 15 But of course that will go to a question as to 16 whether or not this loan or amount obligation is 17 intended and likely to be outstanding for more than a 18 year. So the interest being paid on that loan has 19 effectively bought that money for a period of time which 20 makes it yearly interest even though it may nominally as 21 most mortgages are be repayable within six months. 22 LORD JUSTICE PATTEN: So then is this right: you say that 23 the essential criterion for both those examples, the 24 calculation for the statutory interest is easier than 25 the other example because one knows with the benefit or</p> <p style="text-align: center;">Page 38</p>	<p>1 an annual rate rather than by reference to the increase 2 in the value of a property, for example? 3 I mean, surely the method by which the rate is 4 calculated, i.e. by reference to a period of time 5 greater than a year, has to be relevant? If in fact the 6 money was outstanding for over a year but it was 7 calculated by reference to, I don't know, the increase 8 in the price of an index or some other arbitrary figure, 9 how could it be yearly interest in those circumstances? 10 So surely one of the criteria is the method by which 11 the rate is calculated by reference to a period of time. 12 MR GAMMIE: Well, My Lady, I must say -- 13 LADY JUSTICE GLOSTER: Isn't that what Bunny v Benby is 14 saying -- never mind what the Goslings case or other 15 cases say -- why isn't the rate relevant? 16 MR GAMMIE: The oddity -- when I say oddity -- one feature 17 about Bebb v Bunny is I think it was dealing with unpaid 18 purchase monies. You might well say unpaid purchase 19 monies aren't normally outstanding for more than a year, 20 but they still found that it was yearly interest, and 21 part of that might lie behind the point that you are now 22 making, my Lady. I have to say I don't think I would 23 say that. 24 LADY JUSTICE GLOSTER: Never mind whether -- it's not 25 binding on us anyway.</p> <p style="text-align: center;">Page 40</p>

<p>1 MR Gammie: Well, no, my Lady. But just to take your point, 2 so I borrow money now --</p> <p>3 Lady Justice Gloster: Yes.</p> <p>4 MR Gammie: -- and I am going to repay it in, say, 13 5 months' time, and the amount that I will repay will be 6 that amount plus an amount based on an index of some 7 sort. For example, if the index has fallen, I will just 8 repay the amount and I won't have to pay anything 9 further. If the index has gone through the roof, I will 10 pay something extra on that. Leaving aside the 11 possibility that that type of arrangement is covered by 12 innumerable other statutory provisions, is the amount 13 over and above what you repay yearly interest?</p> <p>14 I think it would be difficult to say it wasn't 15 interest of some sort. You could think about a similar 16 arrangement under which you were going to pay interest 17 at a specified rate but it was contingent upon the index 18 moving a certain extent. I must say I --</p> <p>19 Lady Justice Gloster: But it's not related to the time use 20 of money. Of course, in one sense it's reflecting 21 what's happened over a period. But to say it's yearly 22 interest whether you repay at the end of six months or 23 whether you repay at the end of 9 months, or whether you 24 repay at the end of 15 months, is going to depend on 25 what the index has done in the meantime. So even in the</p> <p style="text-align: center;">Page 41</p>	<p>1 debt on apart from the administration might not be. So 2 the point could arise.</p> <p>3 MR Gammie: Well, I hesitate, my Lord, to -- but it would be 4 expressed as a rate, I think.</p> <p>5 Lord Justice David Richards: You yourself have been giving, 6 perfectly correctly I should have thought, examples 7 where interest is payable at a rate which is not 8 expressed as an annual rate, and that could be the rate 9 applicable to the debt apart from the administration.</p> <p>10 MR Gammie: My Lord --</p> <p>11 Lord Justice David Richards: You could have this 12 example: you could have a loan for 13 months with 13 interest payable at the aggregate of the overnight rates 14 applicable during the 13 months. So it's undoubtedly 15 a loan for 13 months, it's fixed. But the rate of 16 interest is not expressed as an annual rate, but you 17 would say that's yearly interest.</p> <p>18 MR Gammie: Yes.</p> <p>19 Lord Justice David Richards: It's difficult to see why it 20 shouldn't be. The fact that it's expressed not as 21 a yearly rate but as an aggregate of overnight rates, it 22 would be very surprising if that made a difference as to 23 whether it was yearly interest.</p> <p>24 MR Gammie: Indeed, my Lord, and I certainly would endorse 25 that.</p> <p style="text-align: center;">Page 43</p>
<p>1 15-month example, why is that a yearly interest payment?</p> <p>2 MR Gammie: Well, I think in that instance, the return not 3 being calculated by any rate as such, it would be yearly 4 interest by reference to the time over which the money 5 was outstanding and effectively the reward you've got 6 for having the use of that money for a period of time 7 which exceeded a year. It just so happens that you've 8 constructed the basis upon which it's calculated, your 9 return on that use of money, by reference to an index.</p> <p>10 So it's not the --</p> <p>11 Lady Justice Gloster: I can't quite understand why you are 12 shirking from the proposition that the fact that the 13 rate is calculated by reference to an annual rate, 14 an interest rate over a year, is not an indicia of 15 whether this is yearly interest. I thought --</p> <p>16 MR Gammie: My Lady if I'm shirking from it -- I am shirking 17 from it for two reasons. Firstly, because it's not 18 relevant here because what we're looking at is a rate 19 specified either by reference to the Judgments Act or 20 calculated by the terms of the loan, so it doesn't arise 21 in this case. I'm also shirking from it because --</p> <p>22 Lady Justice Gloster: But we are because the Judgments Act 23 rate is a yearly rate.</p> <p>24 MR Gammie: It is.</p> <p>25 Lord Justice David Richards: But the date applicable to the</p> <p style="text-align: center;">Page 42</p>	<p>1 In terms of the rate that is paid here, paragraph 9 2 of the rule says:</p> <p>3 "The rate of interest payable under paragraph 7 is 4 whichever is the greater rate specified under 5 paragraph 6 or the rate applicable to the debt part from 6 the administration."</p> <p>7 The rate as has been noted under 6 is expressed as 8 an annual rate, so I would have thought that to be able 9 to work out whether you had a greater rate applicable to 10 the debt apart from the administration, you'd at least 11 have to be able to express that in terms of an annual 12 rate, even if it's calculated in the way you say, 13 my Lord.</p> <p>14 Lord Justice David Richards: You must be right. But as you 15 have said, leaving aside the examples of rates 16 calculated by reference to an index or something, all 17 rates are capable of expression as an annual rate. So 18 I mean even overnight rates are capable of expression as 19 an annual rate, so I don't think there would be 20 a practical difficulty in working out which was the 21 greater. But that doesn't exclude the possibility of 22 a contract which does have a rate applicable to the debt 23 which is not expressed as an annual rate.</p> <p>24 MR Gammie: That, my Lord, I would agree with. I don't 25 actually think it matters for yearly interest that you</p> <p style="text-align: center;">Page 44</p>

1 express it as an annual rate.
 2 LORD JUSTICE DAVID RICHARDS: Yes, that's your
 3 submission: it doesn't matter. You don't accept my
 4 Lady's proposition that it's a necessary ingredient of
 5 yearly interest, but the interest, the rate of interest,
 6 is expressed as an annual rate.
 7 LADY JUSTICE GLOSTER: But I think what I put to you apart
 8 from that proposition was the fact that it is expressed
 9 as an annual rate, is that an indicia of one of perhaps
 10 many that it is in fact yearly interest? I think that's
 11 what I am having difficulty with.
 12 MR GAMMIE: I would certainly agree with that proposition;
 13 that it's something you would look at and take into
 14 account in arriving at a conclusion on these matters to
 15 the extent you are dealing with a situation where it is
 16 not clear. Obviously you know what it is and you've got
 17 to make up your mind.
 18 I think my reluctance -- at one point I was mindful
 19 in relation to your early example, my Lady, about the
 20 index. Of course one has to remember from this side of
 21 the matter, in other words from the Revenue's
 22 perspective, there is the very important question of
 23 whether or not tax can be collected on interest which
 24 flows abroad, because the withholding is the principal
 25 collection mechanism where interest is paid to a foreign

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1 person.
 2 LADY JUSTICE GLOSTER: Mm.
 3 MR GAMMIE: Although I haven't taken instructions from
 4 behind me, I would suspect there would be some
 5 reluctance to think that the example you gave by
 6 reference to the index did not give rise to interest
 7 from which a withholding obligation existed.
 8 As I say, I don't see that that is a necessary
 9 feature of the decision.
 10 LADY JUSTICE GLOSTER: But if there is a reference, as here,
 11 to an annual rate --
 12 MR GAMMIE: Then that's a relevant indicia to take account
 13 of.
 14 LADY JUSTICE GLOSTER: -- then that can be taken into
 15 account.
 16 LORD JUSTICE DAVID RICHARDS: I am sure in the context of
 17 Lehman Brothers, you are wise to be cautious. Because
 18 if any institution had a wide range of instruments by
 19 reference to all sorts of matters, it was probably
 20 Lehman's.
 21 MR GAMMIE: Indeed, my Lord, and I am sure you have a much
 22 better grasp --
 23 LORD JUSTICE DAVID RICHARDS: Hardly. Can I just ask you
 24 this Mr Gammie -- perhaps you are going to come to this
 25 as part of your argument so we can postpone this -- the

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1 reason we're concerned about whether or not it's yearly
 2 interest is because the legislation only imposes
 3 an obligation to withhold tax if it is yearly interest.
 4 Do we get any help from that in deciding what Parliament
 5 intended to capture in terms of interest for those
 6 purposes? I mean, clearly they didn't decide that any
 7 form of interest should give rise to an obligation to
 8 withhold tax regardless of how -- you know, whether it
 9 was yearly, monthly or anything else. So what is it
 10 that they were trying to identify as being the type of
 11 payment that should attract a withholding obligation?
 12 MR GAMMIE: My learned friend I think may well want to delve
 13 into the history of this.
 14 LORD JUSTICE PATTEN: I know. I looked at it, but
 15 I couldn't at the moment just by looking at the
 16 legislation see anything very obvious that defined the
 17 characteristics of what is yearly interest. But
 18 something must have been in the minds of the legislation
 19 in limiting it to that type of payment.
 20 MR GAMMIE: Well, my Lord, I think historically it goes back
 21 to Addington's system in 1802/1803 of deduction of tax
 22 at source where effectively if you were borrowing at
 23 interest and you had a taxed fund then the -- you
 24 withheld the tax on the interest and retained that
 25 against your own tax liability, so effectively you were

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1 sharing your taxed fund with the lender. I think
 2 historically that is the origins of the idea, but over
 3 the years of course, that has essentially sort of --
 4 when I say fallen out of use in our system, I mean that
 5 has gradually got -- the traces of that have become
 6 weaker and weaker as the years have gone by.
 7 But the contrast in general terms would have been
 8 between short-term accommodation where you just happened
 9 to incur a bit of interest but for no particular --
 10 I mean, you just incur a small debt which you pay
 11 quickly and pay some interest on it, or as in Goslings &
 12 Sharpe you are dealing with a sort of transaction in the
 13 financial markets on a short-term duration. So the
 14 contrast has always been between yearly interest and
 15 what is called short interest; in other words just
 16 something which arises in the ordinary course of maybe
 17 one's business but without having any longevity to it.
 18 And part of that is because originally back in
 19 history, by borrowing longer term you were effectively
 20 sharing part of your income with the person who lent you
 21 the money, put you in funds, for a particular purpose.
 22 LADY JUSTICE GLOSTER: So is it the position that interest
 23 on overnight deposits are not subject to tax, or under
 24 this provision?
 25 MR GAMMIE: No, my Lady, they are obviously subject to tax

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<p>1 to the extent they give rise to interest that may be 2 taxable on you or as the person entitled to it. But it 3 doesn't necessarily give rise to an obligation on the 4 person who is paying the interest to withhold on account 5 of your liability. 6 LADY JUSTICE GLOSTER: Yes, I see. So this is all to deal 7 with withholding, is it? It matters that it's yearly 8 interest because of the withholding -- 9 MR GAMMIE: In the modern era, yes, that is essentially what 10 it's about. 11 LADY JUSTICE GLOSTER: So the fact that it contributes to 12 profits means it will be taxable at the end of the day, 13 or may be taxable at the end of the day -- 14 MR GAMMIE: Yes, and of course relatively short periods of 15 interest or transactions that give rise to that 16 overnight interest and the like would frequently be 17 between financial traders and the like who are -- or 18 people who are going to bring it in as part of their 19 business profits rather than just you and I getting 20 a bit of interest on our savings. 21 LADY JUSTICE GLOSTER: Yes. 22 Yes, I see, thank you. 23 MR GAMMIE: Well, my Lady, we sort of have gone slightly 24 away from matters but I think not irrelevantly so. 25 We've been focusing on things I was going to come on to.</p> <p style="text-align: center;">Page 49</p>	<p>1 then you took it into account; but the extent that 2 judgment was obtained after administration was entered 3 into or could have been obtained after you went into 4 administration, that was not within the contemplation of 5 paragraph 9 of this statutory scheme. I won't read it 6 all, but it's summarised by Mr Justice Hildyard in 7 paragraphs 454 to 464. 8 The point he was then having to consider was whether 9 or not or to what extent a rate applicable to the debt 10 apart from the administration could take account of 11 subsequent actions by the creditor following the 12 administration. 13 We can see that if we turn on to page 1590. He has 14 set out the contentions of the various parties in the 15 intervening period, and as he says at paragraph 517: 16 "The central dispute is as to whether or not 17 ...(Reading to the words)... purposes between on the one 18 hand the rate of interest the entitlement to which 19 arises by virtue of a judgment obtained after the date 20 of administration and on the other hand a right of 21 interest proscribed by contract is applicable to 22 a contractual entitlement contingently or prospectively 23 available to a non-defaulting party but which has not 24 been triggered prior to the date of administration and 25 which cannot be ...(Reading to the words)... without</p> <p style="text-align: center;">Page 51</p>
<p>1 The one aspect I hadn't specifically looked at or in 2 relation to the past decisions was what was taken or 3 what's been decided to be under paragraph 9 of rule 2.88 4 the rate applicable to the debt apart from the 5 administration. We've talked a little bit about that. 6 We can see that if we go, for example, to the 7 supplemental authorities bundle, and in this case tab 4 8 just to pick up some other facets of what we're looking 9 at here. This was the decision of Mr Justice Hildyard 10 in relation to various ISDA master agreements and other 11 amounts. If we turn to page 1577, for example, we can 12 pick up his summary of what he says -- 13 LORD JUSTICE PATTEN: Sorry, which paragraph is it? 14 MR GAMMIE: It's paragraph 454 on page 1577, my Lord. 15 LORD JUSTICE PATTEN: 454. 16 MR GAMMIE: What's being discussed here is what's called 17 supplemental issue 1A, which as is recorded in 18 paragraph 454 derived from an issue that had been 19 decided in the Waterfall IIA decision; that the rate 20 applicable to the debt apart from the administration in 21 paragraph 9 of the rules was apt to include -- or 22 whether it was apt to include a foreign judgment rate of 23 interest or other statutory rate. The decision by 24 my Lord David Richards was that to the extent foreign 25 judgment had been obtained before the administration,</p> <p style="text-align: center;">Page 50</p>	<p>1 further action by that non-defaulting party after that 2 date, for example by designating an early termination 3 date and/or taking steps to establish a particular rate 4 of interest." 5 Then he goes on at 518: 6 "In my view, there is such a distinction. The 7 distinction lies in the source of the right or 8 entitlement and the existence or not of that source as 9 at the date of administration. A right or entitlement 10 which arises not because of a contractual term 11 ...(Reading to the words)... and the rules relating to 12 interest in respect of such a judgment once obtained." 13 Then going on at 520: 14 "That is to be contrasted with a right conferred by 15 contract which even if its exercise and quantification 16 post-dates the date of administration is in existence at 17 that date whether as a contingent or future right. I 18 agree therefore with the administrators ...(Reading to 19 the words)... fail to recognise the difference between 20 (a) the possibility of a future right to payment and (b) 21 the existence of present right to payment on the 22 fulfilment of a condition." 23 That leads on to his conclusion in particular which 24 comes at paragraph 528 on the next page where he says: 25 "Supplemental issue 1A is to be answered in the</p> <p style="text-align: center;">Page 52</p>

1 affirmative...(Reading to the words)... apart from
 2 administration in rule 2.88, paragraph 9, will include
 3 in the case of a provable debt that is a close-out sum
 4 under a contractual rate of interest that begins to
 5 accrue only after the close-out sum became due and
 6 payable due to action taken by the creditor after the
 7 date of administration."
 8 And that was considered in this court in its
 9 decision last week, and in particular it's dealt with --
 10 this is at the next tab, tab 5 in the supplemental
 11 bundle -- as item 12.
 12 LADY JUSTICE GLOSTER: Paragraph?
 13 MR GAMMIE: Paragraph 70, going through really to the end of
 14 the decision, because it had been suggested that there
 15 was a conflict between what my Lord David Richards had
 16 decided and what Mr Justice Hildyard had decided in that
 17 subsequent decision, the conclusion being that there
 18 wasn't. They each -- this is paragraph 75 where this
 19 court notes there was no irreconcilable or even
 20 significant tension.
 21 So to that extent, as we can see, the terms of the
 22 original debts for which a proof is made can be looked
 23 at to determine the rate of interest and including
 24 action that is permitted under the terms of the contract
 25 which is relevant to the determination of the rate of

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1 interest, and therefore whether it is a rate greater
 2 than the rate specified by the Judgments Act.
 3 I note in particular that one of the reasons for
 4 Mr Justice Hildyard drawing the distinction between the
 5 two was the fact that where you are dealing with
 6 a judgment which is obtained after the administration is
 7 entered into, the source of that particular interest
 8 that's paid in respect of that judgment is the judgment
 9 itself rather than the original debt that gives rise to
 10 that judgment.
 11 LADY JUSTICE GLOSTER: Sorry, what are you getting from
 12 this?
 13 MR GAMMIE: That I say becomes relevant in looking -- or at
 14 least a consideration to bear in mind when we look at
 15 the three particular cases the Revenue rely on here of
 16 instances where interest has been regarded as yearly
 17 interest where it arises from a judgment of the court
 18 either in terms of requiring a trustee to make good his
 19 breach of trust and the financial consequences of his
 20 breach, or company directors, or in the case of interest
 21 paid in respect of personal injuries, where again they
 22 share the common feature with the statutory scheme here,
 23 but they look back over a period to determine whether or
 24 not the interest payable is yearly interest.
 25 But also they arise as a result of a decision by the

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1 court either finding that a debt is due by and therefore
 2 has to be accounted for, or that there is a breach of
 3 trustees' duties or fiduciary obligations by directors;
 4 where we say that the relevant right to interest, that
 5 is the factor that triggers the right to interest, it's
 6 not -- there is no distinction, we say, between our case
 7 where you are looking at a debt which has been proved
 8 which under the statutory scheme subsequently gives rise
 9 to a right of interest because there is a surplus and
 10 a situation where, for example, a trustee is in breach
 11 of trust and is found subsequently to be in breach of
 12 trust and the court orders him to make good the
 13 financial consequences of that together with interest.
 14 In each case (a) you are looking back and (b) you
 15 are dealing with a situation where there is in one case
 16 a statutory regime, but you are looking at in other
 17 cases an order by the court as to what should be made
 18 good.
 19 LADY JUSTICE GLOSTER: I am surprised that there isn't
 20 a situation where previously the Revenue has regarded
 21 interest payable under the Judgments Act as yearly
 22 interest. Is there authority which illustrates that or
 23 not? I mean, it must have come up, mustn't it, under
 24 the Judgments Act previously?
 25 MR GAMMIE: My Lady, you would think so, I can't --

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1 LADY JUSTICE GLOSTER: It's just a plain situation where, as
 2 it happens, because of an appeal or something like that,
 3 interest has been outstanding since the date of the
 4 original judgment for a year.
 5 MR GAMMIE: I can't immediately think that there is a case
 6 explicitly dealing with Judgments Act interest. But of
 7 course the various cases there are which have considered
 8 interest, such as Riches and Regal v Gulliver and the
 9 like have all --
 10 LADY JUSTICE GLOSTER: Said yearly.
 11 MR GAMMIE: -- said it's yearly, yes.
 12 LORD JUSTICE DAVID RICHARDS: Those aren't judgment rate
 13 cases.
 14 MR GAMMIE: No.
 15 LADY JUSTICE GLOSTER: They are equitable.
 16 LORD JUSTICE DAVID RICHARDS: I mean, because those are
 17 pre-judgment interest rather than post-judgment. My
 18 Lady is thinking of where you have a judgment and then
 19 you get interest at the Judgments Act rate. And there's
 20 an appeal, it doesn't come on for a couple of years,
 21 whether that's treated as yearly interest.
 22 MR GAMMIE: I'm not aware of any authority that has had to
 23 consider it. I can obviously take instructions as to
 24 how it is generally viewed within or dealt with within
 25 the Revenue.

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1 LORD JUSTICE DAVID RICHARDS: I mean, it may be in line with
 2 the cases that -- I mean the purpose -- a judgment
 3 should normally be paid. It may be stayed pending
 4 an appeal but it's not like a loan which though
 5 expressed to be for six months is in fact intended to
 6 last for more than a year, it's a rather different
 7 situation. That may be why it's not come up, I don't
 8 know.
 9 MR Gammie: Well, my Lord, I'm not sure I can immediately
 10 help you. I can certainly make further inquiries.
 11 Lady Justice Gloster: The reason why the interest hasn't
 12 been paid here is no doubt because of all the
 13 litigation.
 14 MR Gammie: Well, I--
 15 Lady Justice Gloster: Out of the surplus.
 16 MR Gammie: Well, I assume this particular litigation
 17 especially, yes.
 18 Lord Justice David Richards: I would think in Lehman
 19 Brothers -- well, for the first year of the
 20 administration, in fact for rather longer than the first
 21 year of the administration, there wasn't and wasn't
 22 anticipated to be a surplus. So in this case, clearly
 23 the litigation must have prolonged matters, but --
 24 MR Gammie: My Lord, I think I noted somewhere -- I may not
 25 be able to immediately find it -- but I think it was

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1 something like September 2012, and I think you recorded
 2 in one of your earlier decisions, my Lord. It was
 3 about September 2012 that it started to begin -- that
 4 there might be a surplus.
 5 Lord Justice David Richards: Yes, yes.
 6 Lady Justice Gloster: Yes, okay.
 7 MR Gammie: My Lady, I think I've taken you to most of the
 8 aspects that describe what it is we're looking at. In
 9 relation to the rate of interest, the earlier decisions
 10 establish that the rate of interest is a simple rate, it
 11 doesn't continue beyond the payment of the proved debts,
 12 and to the extent that the rate on the original debt,
 13 for example, is a compounding rate, that can be taken
 14 into account in working out under paragraph 9 whether or
 15 not the rate under the debt in the absence of the
 16 administration would have been greater than the judgment
 17 rates. But I think I have probably gone through most of
 18 the features of the interest that we're looking at.
 19 I suppose the next logical point is to look at least
 20 at the tax provision under which interest or tax on
 21 interest has to be withheld. Just to look at it, that
 22 is in authority bundle 1 at tab 34, which we can look at
 23 briefly and will not enlighten us to a significant
 24 extent because it will just express the problem we are
 25 having to deal with.

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1 It's section 874 of the Income Tax Act 2007.
 2 It obviously has a much greater longevity in terms of
 3 its history in the tax provisions, but what it says now
 4 is:
 5 "This section applies if a payment of yearly
 6 interest arising in the United Kingdom is made."
 7 The House of Lords has previously considered or had
 8 occasion to consider what "arising in the
 9 United Kingdom" means, but I don't think that is
 10 an issue here. So:
 11 "Where it is made by a company, by a Local
 12 Authority, by or on behalf of a partnership of which
 13 a company is a member, or by any person to another
 14 person whose usual place of abode is outside the
 15 United Kingdom."
 16 Then subsection (2):
 17 "The person by or through whom the payment is made
 18 must on making the payment deduct from it a sum
 19 representing income tax on it at the basic rate in force
 20 for the tax year in which it is made."
 21 That particular rule is subject to a whole variety
 22 of exceptions in later sections, but I don't think they
 23 need detain us here because we're just concerned on what
 24 is meant by yearly interest and the implications of
 25 section 874.

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1 LORD JUSTICE PATTEN: And the payer then has to account to
 2 the Revenue, does it, for the tax that's been deducted?
 3 MR Gammie: That would be the normal situation. In fact,
 4 it's been the situation for companies since 1965 because
 5 when Corporation Tax was adopted in 1965, companies
 6 ceased to be subject to income tax. Before 1965 they
 7 had been subject to income tax and Corporation Tax so
 8 they were part of this old regime. But of course when
 9 Corporation Tax was introduced in 1965, companies had on
 10 a much more general basis to account for tax on yearly
 11 interest by withholding. Nowadays, most payments
 12 between companies, certainly if they are resident in
 13 this country, can be made without withholding but that
 14 is a separate matter. Certainly if you are looking at
 15 a payment abroad, you are looking at a payment where the
 16 interest has to be accounted for to the UK Revenue.
 17 So as I've previously noted, it depends upon
 18 payment, so you have to be able to know at the time at
 19 which you are making the payment that your obligation to
 20 deduct arises. Interest, certainly for companies these
 21 days of course, tends to be taxed and relieved on
 22 an accruals basis, but this is always operated by
 23 reference to payment. And you can understand that
 24 particularly if you are thinking of payments to persons
 25 who are resident outside the United Kingdom, so abroad.

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1 And --
2 LORD JUSTICE PATTEN: Are these just simply Revenue
3 collection provisions? They are not intended to --
4 I mean, because you've got to account to the Revenue for
5 the tax you deduct, it's not a provision which enables
6 you to retain the tax on the basis that it's already
7 been paid out of your --
8 MR GAMMIE: No. In their current form, they are essentially
9 a collection mechanism, indeed an essential collection
10 mechanism in relation to persons abroad, because the
11 liability of a person abroad to UK tax is often limited
12 to the amount that is withheld at source. So they have
13 no further liability.
14 I have to say that -- I mean, that is as a sort of
15 starting point. Again, there are lots of further things
16 one could say about that, but that's the essential
17 function of it.
18 LORD JUSTICE PATTEN: Yes.
19 MR GAMMIE: One obvious point of course on the basis that it
20 is focusing on payment is that generally speaking,
21 you're not talking about a situation where you are
22 having to ask yourself whether or not the obligation to
23 pay interest is contingent or conditional in some way.
24 Because if it was, you wouldn't generally be making the
25 payment of the interest anyway.

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1 So you are talking about -- I would have thought
2 almost every case, my learned friend may think of
3 an exception -- you are thinking of a case where there
4 is an obligation, current and immediate obligation, to
5 pay interest in respect of some debt or other obligation
6 giving rise to it.
7 As I've already noted, frequently the payment of
8 interest will be for a period of less than a year. So
9 as I've already said, it can't be by reference to the
10 period for which the interest is actually paid; in other
11 words, the period that it's dealing with which the
12 relevant identifier for yearly interest. So in most
13 cases as we've discussed, you need to look at some other
14 feature of the obligation under which the interest
15 arises to identify whether or not it is yearly interest.
16 As I've already said, that generally speaking
17 involves looking to the future and, in the language
18 certainly of some of the case law, whether or not the
19 obligation under which the interest arises has a future
20 tract of time.
21 But it doesn't depend, in my submission, upon the
22 frequency or the recurrence of the payment of interest.
23 There's no reason why you can't borrow money, for
24 example, for two years on the basis that when you repay
25 your loan at the end of two years, you will repay it

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1 with interest. There will only be a single payment of
2 interest at the end of the two-year period, but the fact
3 that there is no recurrence involved in terms of the
4 number of payments you make can't affect the fact, in my
5 submission, that that's still yearly interest.
6 In fact, if you think about -- if you go back to
7 *Bebb v Bunny*, there I think if you are talking about
8 interest payable on unpaid completion monies, again you
9 would normally be thinking about a single payment of
10 interest made at the time at which the completion monies
11 are discharged. So recurrence of payment is not,
12 I would say, a feature that comes into -- or is any
13 particular relevance in determining whether it's yearly
14 interest.
15 LORD JUSTICE DAVID RICHARDS: Before you leave this section,
16 Mr Gammie, can you just help me on subsection (5)A, what
17 that is dealing with.
18 MR GAMMIE: "The following to be treated as ...(Reading to
19 the words)... made by a registered society" --
20 LORD JUSTICE DAVID RICHARDS: No, forgive me, it's
21 subsection (5) A.
22 MR GAMMIE: I see.
23 LORD JUSTICE DAVID RICHARDS: Yes, sorry.
24 MR GAMMIE: "For the purposes of subsection (1) ...(Reading
25 to the words)... payment of yearly interest irrespective

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1 of the period in which interest is paid."
2 My Lord, I am not sure that I can necessarily --
3 I mean, somebody obviously thought --
4 LORD JUSTICE DAVID RICHARDS: Well, presumably compensation
5 is defined somewhere. I am just wondering what this
6 going to. Anyway, I am just curious about that
7 provision, what it's dealing with. You may need to look
8 up the relevant reference.
9 MR GAMMIE: My Lord, I was just trying to identify when that
10 was introduced.
11 LORD JUSTICE DAVID RICHARDS: I think, presumably -- anyway,
12 I'm not sure, but --
13 MR GAMMIE: Over the short adjournment, my Lord, I can see
14 if I can come up with an answer for you on that.
15 LORD JUSTICE DAVID RICHARDS: It's slightly -- yes, thank
16 you.
17 MR GAMMIE: Yes.
18 My example was a two-year loan with interest paid as
19 a single payment at the end of that and I say it's not
20 because you've paid interest on several occasions. Of
21 course you can say in the conventional manner we've
22 already talked about that the interest can be regarded
23 as accruing over that two-year period, even though there
24 is no point in the two-year period until the loan is
25 repaid where interest can actually be immediately

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1 demanded for payment. But it can at least be regarded
 2 as accruing over the two-year period.
 3 LORD JUSTICE PATTEN: Sorry, this is a case where, what,
 4 like the late completion case you are talking about?
 5 MR GAMMIE: Which case, my Lord?
 6 LORD JUSTICE PATTEN: I don't know, I am asking you. The
 7 point you are making relates to what sort of case are
 8 you talking about?
 9 MR GAMMIE: I was talking about a loan of money for
 10 a two-year period where it's repayable with interest at
 11 the end of two years.
 12 LORD JUSTICE PATTEN: At the end of the term, yes.
 13 MR GAMMIE: So there is one payment of interest which occurs
 14 at the end. There is no point in time between the loan
 15 being made and being repaid when interest can be
 16 demanded, but we could talk in terms of the interest
 17 having accrued over that two-year term of the loan.
 18 So my next proposition, or at least the point I make
 19 is: does it matter if the interest -- does it alter the
 20 character of the interest if the interest is conditional
 21 or contingent in some way? Suppose A pays B a sum of
 22 money but with repayment of that money subject to
 23 a contingency. And if the contingency occurs, the
 24 amount is repayable with interest from the day at which
 25 the money was provided. So at the end of the second

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1 year, the contingency occurs, the money is repaid with
 2 interest, does it make any difference to our view of how
 3 that interest is regarded yearly or otherwise? Because
 4 not only the interest couldn't be demanded for immediate
 5 payment over that two-year period, but there was
 6 a contingency which attached to whether or not you would
 7 get the payment back with interest at all. So both the
 8 principal sum and the interest was contingent. Do we
 9 regard that as accruing or do we regard it as making any
 10 difference to the character of the interest?
 11 I say that it doesn't. In the present case we're
 12 dealing with under the statutory scheme, we're dealing
 13 with a situation where the principal amount by reference
 14 to which the statutory interest is going to be
 15 calculated is an amount that isn't contingent at all in
 16 the same sense because if it's a proved debt, it's
 17 an amount which is to be repaid. It may well be that in
 18 calculating the amount that is proved, you have to take
 19 account of the conditionality or the contingency that
 20 attaches to the underlying debt in some way. But the
 21 amount that has been proved under the administration is
 22 an amount which is due to be repaid. It's just that if
 23 it is repaid in full so that a surplus emerges, you are
 24 also entitled to interest.
 25 I say there is no difference between any of these

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1 examples in terms of how we should view the interest.
 2 They are all examples of payment of yearly interest.
 3 LORD JUSTICE PATTEN: There is a difference between the
 4 statutory interest example and the contingent liability
 5 to pay interest because you can say in that case if it's
 6 a contractual arrangement it accrues from day-to-day or
 7 month to month, or whatever, and is payable contingently
 8 upon the happening of some future event. But it's still
 9 a term of the agreement which is subject to that
 10 occurrence, there is that liability. Because that was
 11 the argument which was advanced unsuccessfully to
 12 support the Bowers v Marris argument in relation to
 13 statutory interest; namely that one way of looking at it
 14 was that there was an accrual but it was simply
 15 contingent on -- and that's been rejected.
 16 MR GAMMIE: Indeed, my Lord. So I'm not saying -- I'm not
 17 saying that these are identical cases because the way in
 18 which I've posed them, of course they are not. But what
 19 is it about a situation where you have a known sum
 20 that's due to be paid, and if a surplus emerges you will
 21 then be entitled to statutory interest under the regime
 22 in a situation where you have contingently the
 23 possibility that you may get the sum back or not plus
 24 interest in due course which means one is yearly
 25 interest and the other is not.

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1 I say there isn't any relevant distinction because
 2 in both of the cases you're -- well, if anything, I am
 3 saying that the contingency in my example where you've
 4 paid a sum which you're only going to get back in
 5 two-years' time or at some point in the future if
 6 a contingency occurs, you are uncertain both as to
 7 whether you are going to get the principal and the
 8 interest, because the contingency attaches to both. So
 9 in a sense, you would say that might be a stronger case
 10 for saying that actually the interest only arises at the
 11 point at which the contingency is satisfied and
 12 therefore the amount becomes payable.
 13 In the statutory case of the administration, you are
 14 dealing with a situation where you have proved for
 15 a debt and you have a sum you know you are going to get.
 16 The only contingency is whether or not the
 17 administration generates a surplus, in which case you
 18 will get interest. I say there is no relevant
 19 distinction between these in terms of answering the
 20 question is the interest you get yearly interest or not.
 21 I'm not saying they're identical, I'm just saying
 22 that I see no relevant criteria of distinction between
 23 the two which identifies one as yearly interest and
 24 other as not.
 25 LORD JUSTICE DAVID RICHARDS: Well, Mr Gardiner may argue

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<p>1 that neither is yearly interest.</p> <p>2 MR GAMMIE: I'll wait to hear Mr Gardiner and then --</p> <p>3 LADY JUSTICE GLOSTER: Anyway, we'll come back and deal with</p> <p>4 that at 2.05. I think this clock is five minutes slow.</p> <p>5 (1.02 pm)</p> <p>6 (The short adjournment)</p> <p>7 (2.05 pm)</p> <p>8 LADY JUSTICE GLOSTER: Yes, Mr Gammie.</p> <p>9 MR GAMMIE: My Lady, perhaps I could deal first with</p> <p>10 Lord Justice David Richards' point about</p> <p>11 subsection (5)(a) of section 874.</p> <p>12 LADY JUSTICE GLOSTER: Yes, about compensation.</p> <p>13 MR GAMMIE: Yes. So in the authorities bundle 1 at tab 34,</p> <p>14 the second page. The provision says:</p> <p>15 "For the purposes of ...(Reading to the words)...</p> <p>16 payable to an individual in respect of compensation [so</p> <p>17 it's interest on compensation] is to be treated as</p> <p>18 payment of yearly interest irrespective of the period in</p> <p>19 respect of which the interest is paid."</p> <p>20 Now the origins of this particular provision are the</p> <p>21 claims that have been made against banks for</p> <p>22 PPI compensation, and I understand there were two</p> <p>23 particular aspects to it. Firstly, the banks not</p> <p>24 knowing whether in respect of interest paid on that</p> <p>25 compensation they might have an obligation to deduct,</p> <p style="text-align: center;">Page 69</p>	<p>1 otherwise at large.</p> <p>2 LORD JUSTICE DAVID RICHARDS: That can't be right surely?</p> <p>3 Because compensation is a word of very wide meaning.</p> <p>4 MR GAMMIE: Yes.</p> <p>5 LORD JUSTICE DAVID RICHARDS: If it's targeted in the way</p> <p>6 you describe, I would have expected the word</p> <p>7 "compensation" would be defined somewhere.</p> <p>8 MR GAMMIE: I'm told it isn't. It may be there was some</p> <p>9 uncertainty as to how they would define the nature of</p> <p>10 claims that were being made against banks in a way which</p> <p>11 would encompass everything.</p> <p>12 LORD JUSTICE DAVID RICHARDS: We'll have to think about</p> <p>13 that.</p> <p>14 LADY JUSTICE GLOSTER: It refers to a building society, does</p> <p>15 it? I'm looking at footnote 4.</p> <p>16 LORD JUSTICE DAVID RICHARDS: Added by the Finance Act ...</p> <p>17 yes.</p> <p>18 LADY JUSTICE GLOSTER: Maybe that's --</p> <p>19 MR GAMMIE: No, I think that must relate to --</p> <p>20 LADY JUSTICE GLOSTER: Is that something else?</p> <p>21 MR GAMMIE: That's footnote 4. I can't immediately see</p> <p>22 where footnote 4 is.</p> <p>23 LORD JUSTICE DAVID RICHARDS: It's just after 5B.</p> <p>24 MR GAMMIE: Of course 5B itself says the Commissioners can</p> <p>25 make regulations providing that subsection (5)(a)</p> <p style="text-align: center;">Page 71</p>
<p>1 but more importantly most of the people that they would</p> <p>2 be paying interest to at the time would be used to</p> <p>3 getting interest on their deposit accounts or any money</p> <p>4 from the bank under deduction of tax so they didn't have</p> <p>5 to make a tax return because they received tax interest.</p> <p>6 So if they started receiving small amounts of</p> <p>7 interest from which tax had not been withheld, they</p> <p>8 would have had an obligation to report that to the</p> <p>9 Revenue and file a tax return, and this would mean</p> <p>10 a very large number of individuals who were not used to</p> <p>11 having to file a tax return would suddenly have to do</p> <p>12 so.</p> <p>13 In the light of that, the Government evidently</p> <p>14 concluded that the easiest thing was to ensure that the</p> <p>15 interest on the compensation was paid under deduction of</p> <p>16 tax so the recipients could just deal with it in exactly</p> <p>17 the same way as they dealt with interest on deposit</p> <p>18 accounts.</p> <p>19 LADY JUSTICE GLOSTER: Yes.</p> <p>20 LORD JUSTICE DAVID RICHARDS: So compensation is defined</p> <p>21 somewhere presumably to encompass what you've described.</p> <p>22 MR GAMMIE: Well, I think not. I'm not aware if it's</p> <p>23 defined -- it's not specifically defined. If you go</p> <p>24 back to the original enacting statute and what was said</p> <p>25 in Parliament, it explains what it's about. But it is</p> <p style="text-align: center;">Page 70</p>	<p>1 doesn't apply in the circumstances proscribed in</p> <p>2 regulation. So I assume they took the view that rather</p> <p>3 than undertake the difficult task of defining what</p> <p>4 compensation was, it was easier to reserve the right to</p> <p>5 exclude things if it suddenly started hitting things it</p> <p>6 wasn't intended to. I'm not aware as to whether any</p> <p>7 regulations have been made.</p> <p>8 LORD JUSTICE DAVID RICHARDS: Yes.</p> <p>9 MR GAMMIE: But anyway --</p> <p>10 LADY JUSTICE GLOSTER: Thank you.</p> <p>11 MR GAMMIE: The next point I should just deal with, my Lady,</p> <p>12 was your point about judgment interest. I had forgotten</p> <p>13 that the interest involved in a case called in Re Cooper</p> <p>14 was actually judgment interest.</p> <p>15 LADY JUSTICE GLOSTER: Oh, right.</p> <p>16 MR GAMMIE: It's in the authorities bundle 2 at tab 8, and</p> <p>17 I think I can say this was a fairly -- well, perhaps</p> <p>18 I shouldn't say unmeritorious -- but it certainly did</p> <p>19 not look a very hopeful case. The individual concerned</p> <p>20 a bankrupt who had had a judgment against him in respect</p> <p>21 of a debt, which if you're at the report the amount</p> <p>22 appears on the second page on page 551. So £3,750 or so</p> <p>23 to which interest at 4 per cent had been added for</p> <p>24 effectively seven days' interest, and his argument was</p> <p>25 that when they made the relevant demand, they should</p> <p style="text-align: center;">Page 72</p>

<p>1 have deducted tax from the interest, so the amounts 2 stated in the particulars were wrong.</p> <p>3 The question was whether or not in specifying the 4 amount that was due you should or should take any notice 5 of whether tax was to be deducted from the interest. In 6 respect of that, I think the court is fairly clear that 7 the creditor only needed to state the amount of the 8 debt, the interest and the cost, they didn't have to 9 deduct tax from that. Then there was the question of 10 would tax have been deducted anyway, to which the 11 conclusion by the Master of the Rolls seems to have been 12 that seven days' interest on this judgment debt wasn't 13 yearly interest, although if you look on page 554 just 14 below the black lining, you can see he slightly defers 15 a bit on that because he says:</p> <p>16 "I am not personally satisfied although I desire not 17 to ...(Reading to the words)... unless and until he 18 himself paid the income tax and produced evidence to 19 that effect."</p> <p>20 Lord Justice Buckley doesn't conclude anything on 21 the interest, whether it was yearly interest or 22 otherwise, and Lord Justice Kennedy agrees, says he's of 23 the same opinion, but doesn't quite say who he is of the 24 same opinion with. So it's not a very satisfactory -- 25 I would say it doesn't cast much light on anything other</p> <p style="text-align: center;">Page 73</p>	<p>1 character as whatever that character may be of judgment 2 debt interest. It's just applying a particular rate.</p> <p>3 So I say the answer in this case has to be answered 4 independent of however judgment interest may or may not 5 be treated in any particular case, which we would 6 obviously say will depend upon the circumstances and the 7 length of time that the interest is payable.</p> <p>8 LADY JUSTICE GLOSTER: But there is a sort of analogy, isn't 9 there, between interest under the Judgments Act on 10 judgments because it's a sort of compulsory but 11 involuntary payment to which you are subjected to by 12 statute and it may or may not go on, you may or may not 13 pay your judgment debt for a year or more. So isn't 14 there an analogy in nature of the obligation? I mean, 15 one is a statutory obligation to pay interest on 16 a surplus and the other is a statutory obligation to pay 17 interest on a judgment debt.</p> <p>18 MR GAMMIE: Yes, one looking forward and one looking back.</p> <p>19 LADY JUSTICE GLOSTER: Yes. So what's the difference in --</p> <p>20 MR GAMMIE: Because when you look back, you can see in 21 respect of what period this payment is made. Whereas 22 when you look forward, you are inevitably in some sense 23 having to speculate on what the obligation giving rise 24 to this particular payment of interest, what is its 25 nature. Whereas you know looking back in the case of</p> <p style="text-align: center;">Page 75</p>
<p>1 than that if you've paid seven days' interest or seven 2 days' interest is demanded in this way, tax doesn't have 3 to enter into the matter.</p> <p>4 LORD JUSTICE DAVID RICHARDS: Isn't the ratio contained in 5 what the Master of the Rolls says at the foot of 6 page 553 and the top of 554 and Lord Justice Buckley 7 does not differ from anything he says.</p> <p>8 MR GAMMIE: Yes. I mean, as he says, seven days' interest 9 in this particular case is not even an agreement for 10 a short loan.</p> <p>11 LORD JUSTICE DAVID RICHARDS: Well, I don't think it's the 12 seven days' interest. He says:</p> <p>13 "Is there any reason for saying that the full amount 14 including the interest was not undoubtedly due ..."</p> <p>15 I think he is talking about the judgment debt and it 16 was due to be paid.</p> <p>17 MR GAMMIE: It was due to be paid, yes, indeed.</p> <p>18 LORD JUSTICE DAVID RICHARDS: There was no arrangement for 19 it to be outstanding for any length of time.</p> <p>20 MR GAMMIE: Absolutely not, no, my Lord. I agree on that, 21 so I don't think it casts a great deal of light. Of 22 course, in relation to the statutory scheme we're 23 looking at under rule 2.88, all paragraph 6 of that rule 24 does is to import the rate of judgment of interest on 25 judgment debts. It doesn't say that this has the same</p> <p style="text-align: center;">Page 74</p>	<p>1 our statutory scheme, there was a proven debt at the 2 date of the administration and the interest is 3 compensating you for the time it has taken to reach 4 a point where interest can be paid out.</p> <p>5 You may not have accrued in the sense we've already 6 discussed, but the fact of the matter is it is payment 7 by reference to the time that has elapsed between the 8 start of the administration and the date of the surplus 9 emerging, and it is compensating for the fact that you 10 haven't been paid or hadn't been able to be paid at the 11 point at which the administration started, which is the 12 period --</p> <p>13 LADY JUSTICE GLOSTER: So is judgment debt interest, isn't 14 it? Obviously you're looking forward and you don't know 15 how long the judgment debt is going to remain unpaid, 16 but you know what the figure is. That doesn't change, 17 the capital figure remains a constant.</p> <p>18 MR GAMMIE: It would depend upon -- I mean, judgment debt 19 interest and whether or not it would be treated as 20 yearly interest would depend upon the particular 21 circumstances on the basis that in the vast majority of 22 cases, it is unlikely to continue for very long because 23 the judgment will be satisfied or enforced, then 24 normally you wouldn't expect it to be treated as yearly 25 interest.</p> <p style="text-align: center;">Page 76</p>

<p>1 LADY JUSTICE GLOSTER: But in the appeal court, the 2 appeal -- so that's a stay of execution followed by 3 appeal -- it might well happen. 4 MR GAMMIE: In which case you might well conclude that by 5 the time the interest is paid, then it has acquired that 6 character, maybe. 7 LADY JUSTICE GLOSTER: So your argument that the critical 8 criterion is the length of time which the period relates 9 to or the obligation has been outstanding and not paid 10 would happen then. 11 MR GAMMIE: Yes. Because if the obligation is discharged 12 within the year, that doesn't necessarily mean it's not 13 yearly interest because other factors may tell you it 14 is. For example, if it's mortgage interest and you just 15 happen to have sold your house and repaid the mortgage 16 in under a year, that wouldn't normally remove it from 17 the category of yearly interest, because the nature of 18 the transaction and the anticipated longevity when it's 19 being paid. 20 But in other circumstances, you might well conclude 21 that -- well, I'm sorry, I'm just trying to think which 22 way round the ... of course, if you are in 23 a circumstance where those sorts of factors aren't at 24 play, the period of time that would have to elapse would 25 ordinarily have to be a year before you started asking</p> <p style="text-align: center;">Page 77</p>	<p>1 a certain period, interest on it is going to be paid. 2 It might be a mortgage, so it might be a 6-month loan, 3 but circumstances would tell you it was going to have 4 potentially a longer life. Here you just have a Local 5 Authority that is entitled to call upon owners to 6 properties to contribute to their expenditure. There 7 isn't a loan transaction and you can see that in what 8 Lord Sumner says, because certainly right at the end of 9 his judgment on pages 889 to 890 at the very bottom, he 10 says: 11 "I am unable to see how the words yearly interest 12 can apply to this transaction. There is no agreement 13 for a short or a long loan. The debt is due and 14 repayment is not enforced. Only in that sense is there 15 a loan. Truly speaking, there is simply a forbearance 16 to put in a suit the remedy for a debt. The repayment 17 might have been enforced at any moment. The debt might 18 have been paid by the debtor at any moment." 19 So it's rather similar to the situation where you 20 have a deposit account with a bank or an account with 21 the bank which can be drawn down at any particular point 22 in time and it's a fluctuating balance, as it was indeed 23 a fluctuating balance in Mayor of Gateshead because the 24 individual concerned paid certain amounts when he could 25 and ran up -- and didn't pay when he couldn't,</p> <p style="text-align: center;">Page 79</p>
<p>1 yourself the question: when the interest is paid is this 2 really yearly interest? You would be asking why was it 3 that the obligation remained outstanding for that period 4 of time. 5 I mean, one of the cases to look at would be the one 6 in the next divider from Cooper at 9, Mayor of 7 Gateshead v Lumsden, where the interest, when it was 8 ultimately paid, had been outstanding for more than 9 a year and yet it was concluded that it was not yearly 10 interest in that particular case. There are particular 11 features about that case which one can draw attention to 12 which may have led the court to its conclusion, but what 13 you were dealing with in Mayor of Gateshead v Lumsden 14 was a Local Authority's ability to call upon owners of 15 premises fronting particular streets to contribute to 16 expenditure by the Local Authority in paving and making 17 up that street. 18 So what you are looking at is an obligation, 19 a statutory obligation that arises to contribute to 20 a Local Authority's expenditure. If you think about the 21 ordinary case in which yearly interest is considered, 22 and certainly at this time if you are putting your mind 23 back to 1914 when this case was heard, you'd think that 24 most obvious cases of yearly interest would be cases of 25 loans. So you are looking at a loan being made for</p> <p style="text-align: center;">Page 78</p>	<p>1 I suppose. But in that situation, and as Lord Sumner 2 also says in his judgment again on page 889, just below 3 halfway down: 4 "Whether or not the present case ...(Reading to the 5 words)... it is unnecessary to consider. Sufficient for 6 the purposes of this case to say no such facts are shown 7 here." 8 So if the Local Authority had reached a specific 9 accommodation with the frontages that they could pay 10 over a particular period of time, that might well have 11 meant the interest acquired a quality going forward of 12 yearly interest. But this was merely just 13 a contribution to the Local Authority's expenses that 14 had been failed to be made for which they were entitled 15 to call property owners to make and on which if they 16 weren't made they could charge interest. But that was 17 not the character of that transaction, as Lord Sumner 18 says, was not such as to confer quality of yearly 19 interest on the interest that was paid. 20 LADY JUSTICE GLOSTER: It's quite difficult to see what the 21 touchstone is, isn't it? 22 MR GAMMIE: Indeed, my Lady. If you read all these cases 23 through, what you start to come to appreciate is that 24 a lot of the early cases they're not exactly doubted in 25 subsequent cases but they are distinguished. And what</p> <p style="text-align: center;">Page 80</p>

<p>1 essentially is -- I say essentially -- going on is 2 a process of looking at the particular type of -- the 3 interest and the transaction under which the interest or 4 the obligation arises to identify whether or not it has 5 that quality which calls it yearly interest. 6 But generally speaking, if it's interest that is 7 paid for less than a year, unless it's paid under 8 a transaction such as a mortgage which could be expected 9 to have a longer life, it's frequently regarded as short 10 interest. If it's paid for more than a year, then 11 generally speaking it is yearly interest, unless as 12 I say you have the type of -- you can look at something 13 about the transaction or the obligation which suggests 14 otherwise as in Mayor of Gateshead. 15 The three particular cases which the Revenue draw 16 attention to, and may be it's perhaps four cases I can 17 just briefly refer you to, as supporting the idea that 18 certainly when you are looking back and computing 19 interest by reference to a sum due over a period of 20 time, even though it may not be said to be accruing in 21 that period of time, the first is a case called Barlow v 22 Commissioners of Inland Revenue, which is behind tab 12 23 in the second authorities bundle, where the individual 24 concerned as a trustee decided that the trust funds 25 weren't appropriately invested so he withdrew all the</p> <p style="text-align: center;">Page 81</p>	<p>1 alternative to whether this supposing it to be interest 2 was not yearly interest." 3 LADY JUSTICE GLOSTER: Where are you reading from? 4 MR Gammie: Page 363, my Lady, and it's the second paragraph 5 with the marking. So the first question was whether or 6 not it was interest, this amount, or whether it was 7 effectively a capital payment to reimburse the trust. 8 It was found to be interest. The second question was 9 was it yearly interest, to which Mr Justice Finlay 10 refers to <i>Bebb v Bunny</i> and <i>Goslings & Sharpe v Blake</i>, 11 and he says about halfway down the paragraph: 12 "It is very well known that in the City of London 13 ... (Reading to the words)... sometimes it is a period of 14 hours, for a week or for a fortnight or a month. What 15 was held there was that the decision in <i>Bebb v Bunny</i> did 16 not apply to these banker short loans ... (Reading to the 17 words)... to be very different subject matter from this, 18 and I think it would be enough to say that in my 19 opinion, upon this point of yearly interest of money, 20 this clearly is yearly interest of money and I think 21 that <i>Bebb v Bunny</i> shows that." 22 So that again is a point where the trustee has to 23 reimburse his trust and pay interest. 24 LADY JUSTICE GLOSTER: Again, it's not very illuminating as 25 to what are the relevant criteria.</p> <p style="text-align: center;">Page 83</p>
<p>1 funds and gave the funds to his own stockbroker to 2 invest in other securities and ended up losing 3 a considerable sum of money for the date at which this 4 all occurred. Ultimately his fellow trustees called him 5 to account and he was ordered to reimburse the trust 6 with the principal amount but also a sum of interest for 7 the period from the time at which he'd withdrawn the 8 monies to the time which he effectively put the trust 9 back in the appropriate funds. That amounted to a sum 10 of £7,700, and the question was whether or not that was 11 yearly interest for these purposes. The conclusion was 12 that it was. 13 LADY JUSTICE GLOSTER: And that the interest period was 14 longer than a year, was it? 15 MR Gammie: It was about five years, I think. 16 LADY JUSTICE GLOSTER: Yes. 17 MR Gammie: He withdrew the sums in 1923 and it was repaid 18 in -- well, he was ordered to repay it in about 1930 and 19 he repaid it over a period up to 1932 or so, I think. 20 So it was a period considerably longer than a year. 21 We can see Mr Justice Finlay on page 363 of the 22 report, so the long paragraph towards the end of the 23 page, he says: 24 "That leaves only the point which also the special 25 Commissioners decided. They decided it as an</p> <p style="text-align: center;">Page 82</p>	<p>1 MR Gammie: No, indeed. 2 Yes, sorry. My learned friend reminded me it was 3 an obligation under a deed effectively to reimburse the 4 trust. So he entered into a deed under which he agreed 5 to reimburse the trust, it wasn't as such a court order 6 if I indicated that. 7 LORD JUSTICE DAVID RICHARDS: But Mr Justice Finlay regarded 8 the case as really governed by the decision of this 9 court in <i>Barnato</i>. We don't have <i>Barnato</i> in the 10 authorities bundle, but <i>Barnato</i> seems to have been 11 a case similar to <i>Regal Hastings v Gulliver</i> where there 12 was a court order requiring the trustee to pay a sum 13 plus interest. 14 MR Gammie: Yes. 15 LORD JUSTICE DAVID RICHARDS: Should we not see <i>Barnato</i> 16 since it is a decision of this court? 17 MR Gammie: We can certainly produce a copy of that, 18 my Lord, yes. 19 LORD JUSTICE DAVID RICHARDS: Yes. 20 MR Gammie: The next case I was going to take you was <i>Regal</i> 21 <i>v Gulliver</i> which is behind tab 14. This was a case 22 where the directors entered into a transaction in 23 relation -- 24 LORD JUSTICE DAVID RICHARDS: I suspect we're all quite 25 familiar with the underlying facts of this case.</p> <p style="text-align: center;">Page 84</p>

<p>1 MR Gammie: Thank you, my Lord. 2 Just then to take you straight to the passages -- 3 they are marked -- in which Mr Justice Cassels deals 4 with it. It's the second column on page 299 where he 5 refers to the case of in Re Cooper, which we've looked 6 at, and Gateshead v Lumsden, which he says I don't think 7 either of the cases are very helpful, and he says: 8 "I have to deal with the facts of this case that the 9 House of Lords held in 1942 that the 10 defendants/directors are to be treated as having had 11 each of them since 1935 the sum of 1,402 in trust for 12 the plaintiffs and the directors must be taken to have 13 invested it at the moment they received it and therefore 14 must pay interest from that moment in time ... (Reading 15 to the words)... or rule 21 at what rate tax should be 16 deductible, rule 19~..." 17 Then he sets that out, and just the final bit which 18 is sidelined where he notes in the second column on 19 page 300 that this was a case of interest which nobody 20 knew would be payable and a rate which was unknown until 21 the House of Lords gave its decision and indicated the 22 rate: 23 "I do not think the amount of interest became due 24 until the date of that decision. Further, I think there 25 was a certain amount of force in the argument</p> <p style="text-align: center;">Page 85</p>	<p>1 individuals had entered into this transaction, the one 2 who was supposed to account for the profit had only 3 disclosed a very small part of the profit. So when the 4 fraudulent partner died, the other partner took action, 5 or co-venturer, took action against his estate to 6 recover the unaccounted for profits and was awarded 7 an amount of interest in respect of those unaccounted 8 profits. That was some £10,000 of interest, and that 9 was in the exercise of the judge's discretion to award 10 interest under section 3 of the Law Reform 11 (Miscellaneous Provisions) Act 1934. That appears in 12 the middle of the page 391. 13 The main question in issue in Riches v Westminster 14 Bank was whether this was actually compensation or 15 a damages sum, or whether it was actually interest in 16 respect of which tax should be paid, and the 17 House of Lords concludes quite forcefully that it is 18 interest, not capital damages or anything of that ilk. 19 They don't specifically discuss the issue of whether or 20 not it was yearly interest, but one can note on 21 page 396 -- 22 LADY JUSTICE GLOSTER: Before you get there, on page 392, 23 there's a very interesting historic description by 24 Mr Grant for the appellant about the origins of 25 interest. I don't think any of that is relevant, but it</p> <p style="text-align: center;">Page 87</p>
<p>1 ...(Reading to the words)... became due it had to be 2 paid by the defendants and if it came out of the 3 defendant's profits or gains, those profits or gains had 4 been subject to tax at 10 shillings in the pound, 5 certainly were entitled to deduct and retain the tax." 6 Again, I say not especially analytic in terms of 7 what is or isn't yearly interest, save that of course 8 one notes that one is looking back and seeing interest 9 is being paid on a sum of money calculated over six and 10 a half years and that sum of money would not have been 11 known to be due and in fact only became due when the 12 House of Lords gave their judgment. 13 The next tab is Riches at 15 which concerned 14 interest awarded under the Law Reform (Miscellaneous 15 Provisions) Act 1934 in relation to a transaction where 16 the taxpayer concerned had entered into a deal with 17 another party on the basis that they'd share the 18 profits. The other party, having made a profit of 19 £93,500-odd effectively told his co-venturer that he'd 20 only made about 21,000 -- 21 LORD JUSTICE PATTEN: Which tab is this? 22 MR Gammie: Apologies, my Lord. It's tab 15. 23 LORD JUSTICE PATTEN: 15, yes. 24 MR Gammie: If you look on page 391, effectively that just 25 gives you the context I was referring to: the two</p> <p style="text-align: center;">Page 86</p>	<p>1 is quite interesting, "the Aristotelian view of the 2 barrenness of money". 3 MR Gammie: I see that, my Lady. Of course, one has to 4 remember his submissions were being made for the 5 taxpayer on the basis that this payment of £10,000 was 6 not interest or was not taxable as interest. 7 LADY JUSTICE GLOSTER: Yes. 8 MR Gammie: Anyway ... 9 One can actually see, if you are looking at the 10 arguments put, that Donovan KC on page 394, he has 11 a very pithy reply to all these arguments that this is 12 not taxable as interest. He just says: 13 "The Act of 1934 by section 3 subsection (1) 14 ...(Reading to the words)... accordingly the award made 15 thereunder is this case must be interest." 16 LADY JUSTICE GLOSTER: Yes. 17 LORD JUSTICE PATTEN: But the appellant's argument was 18 that -- I mean, as we can see from the argument and 19 indeed the judgments you are about to come to -- was 20 that it was really in the nature of compensation or 21 damages. 22 MR Gammie: Yes, indeed, my Lord. And the court says no, 23 it's interest. It doesn't specifically talk in terms of 24 whether it is yearly interest or -- 25 LORD JUSTICE PATTEN: But did it have to be yearly interest</p> <p style="text-align: center;">Page 88</p>

<p>1 in order to be deducted under rule 21 of the Schedules 2 Rules? 3 MR Gammie: No, but if you look at what Viscount Simon says 4 on page 396, he says: 5 "Included in the total sum for which judgment is 6 given is interest of money within the meaning of 7 schedule D of the Income Tax Act 1918. If it is, the 8 respondent when paying the judgment debt is entitled to 9 deduct income tax on the amount of the award of interest 10 10,000 and the appellant must allow such deduction upon 11 receipt of the balance." 12 That is only if it's yearly interest. 13 LORD JUSTICE DAVID RICHARDS: No. 14 MR Gammie: Under rule 19, it is, of the Schedules Rules. 15 We can see rule ... 16 LADY JUSTICE GLOSTER: Just let me read this. 17 MR Gammie: I think ... 18 LADY JUSTICE GLOSTER: The issue is whether it's interest or 19 not, but where do we get on to whether it's yearly? 20 MR Gammie: No, my Lady. As I said, the discussion in this 21 is whether or not it is interest or whether it's 22 compensation. 23 LADY JUSTICE GLOSTER: Yes. 24 MR Gammie: The only point I was drawing attention to was 25 what Viscount Simon says when he refers to:</p> <p style="text-align: center;">Page 89</p>	<p>1 MR Gammie: No, my Lord, absolutely. 2 LORD JUSTICE DAVID RICHARDS: You are not saying there is. 3 MR Gammie: I'm not suggesting there is. It was just that 4 the reference by Viscount Simon to deducting and 5 retaining is, I think -- but my learned friend may want 6 to correct me -- I thought that that would only apply if 7 it was a yearly interest. 8 Because the obligation to deduct an account for tax 9 on interest, on all interest, as opposed to yearly 10 interest. 11 LADY JUSTICE GLOSTER: I think you had better check that. 12 MR Gammie: I can check that. 13 The final case -- 14 LORD JUSTICE DAVID RICHARDS: Interestingly enough at 398, 15 Viscount Simon deals with the further argument -- this 16 is in the sideline passage -- about accretions, which 17 you might say is really talking about accruals. I mean, 18 the other argument seems to be: 19 "It could not be interest because they only came 20 into existence ...(Reading to the words)... under the 21 order." 22 So it was different from interest on judgment debts, 23 which under the terms of the order were accrued -- for 24 want of a better word -- over the period of time from 25 the date of the judgment until payment. Here, one was</p> <p style="text-align: center;">Page 91</p>
<p>1 "... entitled to deduct income tax on the 2 ...(Reading to the words)... deduction on receipt or if 3 it is not made out of profits brought into charge ..." 4 In which case, they must account for interest. 5 LADY JUSTICE GLOSTER: Why does that help you? 6 MR Gammie: I think my learned friend may correct me, but 7 I thought that in relation to the first of those it 8 would only be if it was yearly interest. But maybe my 9 learned friend will put me right about that. 10 LADY JUSTICE GLOSTER: Well, the relevant section should be 11 around in the facts, shouldn't it? 12 LORD JUSTICE DAVID RICHARDS: The question seems to have 13 been whether it was "interest of money", rather than 14 yearly interest. 15 MR Gammie: Yes, yes, indeed, my Lord. It is in fact in the 16 later decision of Lord Denning in <i>Jefford v Gee</i>. He 17 certainly refers to it as having been yearly interest. 18 But in terms of the actual decision, it doesn't -- 19 LADY JUSTICE GLOSTER: If you look at the bottom of 20 page 391, the deduction was made under rule 21 of the 21 All Schedules Rules of the Income Tax Act 1918. So we'd 22 need to look at that to see whether there was any 23 requirement as to yearly, wouldn't we? 24 LORD JUSTICE DAVID RICHARDS: There's no reference to yearly 25 interest that I've spotted.</p> <p style="text-align: center;">Page 90</p>	<p>1 awarding a back payment having regard to the period of 2 time between the liability and the judgment. 3 MR Gammie: Indeed, my Lord, that's correct. And that comes 4 out of the facts on page 391 because the judgment was 5 given in the -- the transaction originally occurred back 6 in 1936 and the judgment was given in 1943, so the 7 £10,000 of interest was what effectively represented the 8 interest from 1936 to 1943. 9 LORD JUSTICE PATTEN: He says it's the accumulated fruit of 10 a tree which the tree produces regularly until payment. 11 Is that different from statutory interest? 12 MR Gammie: Well, it is interest paid pursuant to 13 a statutory provision and at the discretion of the judge 14 who -- 15 LORD JUSTICE PATTEN: I mean, it's very similar in the sense 16 it is -- I know it's discretionary -- but it is the 17 payment of an additional sum by way of compensation for 18 the passage of time, in time value of the money -- 19 MR Gammie: Indeed. 20 LORD JUSTICE PATTEN: -- under a statutory power. 21 MR Gammie: Yes. And in -- so I mean as there is no -- if 22 it were argued in this case that the interest paid 23 because a surplus has emerged is not interest in truth 24 and taxable as such, then I say <i>Riches</i> would be 25 fairly -- pretty conclusive authority to the contrary.</p> <p style="text-align: center;">Page 92</p>

<p>1 Of course, they didn't address the question in Riches as 2 to whether in fact when the interest was paid it would 3 be paid under deduction of tax as yearly interest or 4 whether it could be paid gross. 5 LORD JUSTICE DAVID RICHARDS: Well, the point was that the 6 judgment debtor was entitled to deduct interest by tax 7 but wasn't obliged to. He evidently exercised that 8 statutory right and was held entitled to do so. 9 MR GAMMIE: Yes. And as I say, my Lord, if I'm wrong about 10 this, I'm sure my learned friend or I will put it right. 11 But my understanding was that the only circumstances in 12 which you could deduct and retain would be if it was 13 yearly interest. 14 LORD JUSTICE DAVID RICHARDS: I see. 15 MR GAMMIE: As I say, we'll get to the bottom of that before 16 the end of the hearing. 17 So the final case to take you to is Jefford v Gee. 18 LADY JUSTICE GLOSTER: Where are you going now? 19 MR GAMMIE: Jefford v Gee, my Lady, tab 19. 20 LADY JUSTICE GLOSTER: Yes. 21 MR GAMMIE: This was interest for damages for personal 22 injury which again was awarded under section 3 of the 23 Law Reform (Miscellaneous Provisions) Act 1934, although 24 the Administration of Justice Act 1969 had provided 25 a compulsory power to award interest on damages in</p> <p style="text-align: center;">Page 93</p>	<p>1 actually taxable -- well, certainly taxable then when 2 received for one year, which has been the usual -- when 3 I say usual principle, it has certainly been a principle 4 that's operated for many years for this type of receipt; 5 indeed, I think it still operates now if somebody 6 receives interest covering a longer period in a single 7 year. 8 Then he goes on to say about: 9 "There are special statutory provisions about 10 deducting tax ...(Reading to the words)... we do not 11 think the courts when awarding interest should get 12 involved in such questions." 13 Of course he says that because the Finance Act 1969 14 amended the manner in which interest, particularly 15 interest paid by individuals, was dealt with. So prior 16 to 1969, generally speaking, you effectively got relief 17 on interest if it was yearly interest because you could 18 deduct and retain. Following 1969, you could only get 19 relief for interest if it was applied for certain 20 purposes; for example, to buy your principal private 21 residence. The rules for interest having initially been 22 changed by the Labour Government in 1969 were further 23 amended by the Conservative Government in 1972 before 24 I think we sort of settled down for a slightly longer 25 period when things didn't change, but mortgage interest</p> <p style="text-align: center;">Page 95</p>
<p>1 personal injury cases, but only those decided after 2 1 January 1970. This was a case which I think just 3 shortly preceded that. Most of the discussion is about 4 the power of the court to award interest under these 5 provisions. 6 As you can see on the top of page 143 of the report, 7 it says: 8 "The present case was tried on 16 June 1969 9 ...(Reading to the words)... these will be governed of 10 course not only by the 1934 Act but also by the 1969 11 Act. The Act of 1969 does not alter the principles 12 which the court should apply in awarding interest." 13 So they're mainly concerned with that. But 14 Lord Denning when he gets to it on page 149 does address 15 tax and as he says there: 16 "When the court awards interest on debt or damages 17 for two, three or four years, the interest is subject to 18 tax because it is yearly interest of money." 19 And he cites Riches. We've seen that Riches didn't 20 include any discussion of that, other than the point 21 I've mentioned about whether or not deducting and 22 retaining was only available for yearly interest. 23 LADY JUSTICE GLOSTER: Yes. 24 MR GAMMIE: Then he goes on to point out that even though 25 the interest may cover two, three or four years, it's</p> <p style="text-align: center;">Page 94</p>	<p>1 relief schemes drew out of that. But I don't think any 2 of that impinges upon the question of whether or not the 3 interest is yearly interest. That was merely the manner 4 in which individuals got relief for interest payments 5 themselves in computing their tax liabilities rather 6 than the basic question of whether interest was yearly 7 or otherwise. 8 LORD JUSTICE DAVID RICHARDS: It's difficult to take this 9 case very far, isn't it? Because there doesn't seem to 10 have been any dispute between the parties on the tax 11 treatment. What Lord Denning says simply reflects the 12 submission of Mr Stocker recorded at page 134 with the 13 reference, slightly inaccurately perhaps, to Riches v 14 Westminster Bank, and Mr May QC simply agreed, really, 15 made the same point at page 137, he was amicus. And 16 Mr Kidwell QC I don't think is reported as -- well, he 17 doesn't seem to have dealt with the point at all. 18 MR GAMMIE: No. 19 LORD JUSTICE DAVID RICHARDS: So the point we're wrestling 20 with was not in contention in that case. 21 MR GAMMIE: No, my Lord, and I quite accept that. 22 LORD JUSTICE DAVID RICHARDS: It's not what you would call 23 a tax case is it? 24 MR GAMMIE: No, indeed, they were not principally concerned 25 with tax --</p> <p style="text-align: center;">Page 96</p>

1 LORD JUSTICE DAVID RICHARDS: Yes.
 2 MR GAMMIE: -- even though it has that passing reference.
 3 Insofar as these cases indicate anything, it's
 4 certainly the case that when one is looking back over
 5 a period --
 6 LORD JUSTICE DAVID RICHARDS: I am not saying the same about
 7 Regal Hastings and the other cases. They are directly
 8 addressing this question. Just Jefford v Gee doesn't
 9 take us very far, I don't think.
 10 MR GAMMIE: Yes, I would accept that, my Lord.
 11 So those are the particular cases, the authorities
 12 that we have in particular which are looking, as I would
 13 say, in the same type of situation that we find
 14 ourselves in with this statutory scheme of interest. In
 15 other words, where you have a sum of money, the debt
 16 that is proved at the point at which the company enters
 17 into administration, where interest is paid by reference
 18 to the period that has elapsed between that sum becoming
 19 due and it being repaid, and the interest compensating
 20 for the delay that has occurred in that payment.
 21 And in a situation such as we are looking at here
 22 where that period stretches over a number of years, we
 23 say that that ensures that the interest has the
 24 character of yearly interest. It doesn't -- the fact
 25 that it doesn't accrue in one particular sense of the

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1 word of accruing over the period in which the assets are
 2 being got together and the creditors are being paid off
 3 in respect of their proven debts, I say that does not
 4 deny the interest the character of yearly interest
 5 because it's still interest which is calculated over
 6 a period of time which exceeds by some large margin
 7 a year, and one can see that looking back.
 8 It's not a case where you are having to look at
 9 a payment of interest and having to discern by reference
 10 to the future whether or not this is the type of
 11 interest from which tax should be deducted and accounted
 12 for. And most of the other cases are concerned with
 13 that forward-looking problem as to what it is.
 14 It doesn't mean that there are different criteria
 15 that are applying to decide whether or not the interest
 16 is yearly interest. It's merely that one can see the
 17 criterion that stamps it with that quality when you are
 18 looking back which you can't necessarily immediately
 19 identify in every case looking forward because you have
 20 to ask yourself other questions about the obligation
 21 under which the interest is arising and is being paid
 22 and therefore whether or not that stamps the interest as
 23 yearly interest.
 24 But the fact that the payment is only made once, if
 25 it is in fact made once, is we say neither here nor

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1 there. That doesn't determine whether or not -- the
 2 degree of recurrence in payment certainly isn't of any
 3 particular significance to the question. But the period
 4 in which the amount, the obligation, is outstanding, is
 5 obviously one of the key if not the main feature when
 6 you are looking back to decide whether or not the tax
 7 should be deducted from the interest.
 8 LADY JUSTICE GLOSTER: Right.
 9 MR GAMMIE: My Lady, unless I can help you further, I think
 10 I've probably covered everything.
 11 LADY JUSTICE GLOSTER: Those are all the cases that you want
 12 to refer to?
 13 MR GAMMIE: Indeed, my Lady.
 14 LADY JUSTICE GLOSTER: Thank you very much indeed,
 15 Mr Gammie. Yes, Mr Gardiner.
 16 Submissions by MR GARDINER
 17 MR GARDINER: My Lady, I would like to start if I might by
 18 making the point which is perhaps at the heart of our
 19 submissions, and in the course of that I will try and
 20 deal with what my learned friend has said so far today.
 21 The first and obvious point is that we support the
 22 judgment below. We say it's right for the right
 23 reasons. I won't elaborate on that, and obviously my
 24 Lady and your Lordships have read it.
 25 The learned judge, Mr Justice Hildyard, sets out his

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1 analysis at paragraphs 56 to 63 and I'll come back to
 2 that if I might later. Prior to that, he set out
 3 a summary of our submissions at paragraphs 27 to 34.
 4 Since I draw particular attention to the submissions
 5 that he records at 34 (1), (2) and (3), could I just
 6 remind you of those three because they do lie at the
 7 heart of our submissions.
 8 LADY JUSTICE GLOSTER: Yes, certainly.
 9 LORD JUSTICE PATTEN: What are we looking at?
 10 MR GARDINER: The judgment, paragraph 34, (1), (2) and (3).
 11 He has referred to all the authorities we referred
 12 to before him and he summarises here. So he says in
 13 paragraph 34:
 14 "Drawing these criteria together ...(Reading to the
 15 words)... since statutory interest does not accrue from
 16 day-to-day and is not payable from year year so there is
 17 no period of accrual and no interest is payable unless
 18 and until a surplus has been ascertained following
 19 payment of the debts proved in full, it does not have
 20 the quality of yearly interest.
 21 2. The interest payable" --
 22 LADY JUSTICE GLOSTER: Just stopping there.
 23 MR GARDINER: Yes.
 24 LADY JUSTICE GLOSTER: "Statutory interest not accruing from
 25 day-to-day".

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1 MR GARDINER: Yes.
 2 LADY JUSTICE GLOSTER: I know what Mr Justice David Richards
 3 decided below and what we and the Court of Appeal
 4 endorsed in respect of that in relation to non-accrual.
 5 But just remind me why you say it doesn't accrue in any
 6 sense from day-to-day.
 7 MR GARDINER: It's Mr Justice David Richards's analysis in
 8 paragraphs 149 and 154.
 9 LADY JUSTICE GLOSTER: Yes.
 10 MR GARDINER: It doesn't accrue for this reason: as at the
 11 start of the administration, there is no right to
 12 payment of interest at that particular moment of time or
 13 in the future. You only accrue a future right if you've
 14 got a future right. So if as at the date of the
 15 administration you have a proved debt of 100 -- and
 16 let's assume for the moment that there's judgment rate
 17 debt of 8 per cent -- as at day 1, day 2 and day 3,
 18 there is no increase in the value of your rights by
 19 reference to interest because there is no right at that
 20 stage to the payment of interest in the future.
 21 LADY JUSTICE GLOSTER: Because there's no surplus.
 22 MR GARDINER: That's right, my Lady, yes. Because there's
 23 no surplus, there is no right. If the situation were
 24 that as at the date of the commencement of the
 25 administration the statute said, "and there shall be

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1 paid 8 per cent on the proved debts", then interest
 2 could accrue, because there is a specific and absolute
 3 right from that moment to interest in the future and you
 4 can see it growing day-by-day.
 5 LORD JUSTICE DAVID RICHARDS: Just repeat that for me, would
 6 you mind?
 7 MR GARDINER: If there were an absolute right to the payment
 8 of interest in the future, say in six months' time or
 9 a year's time or whatever --
 10 LORD JUSTICE DAVID RICHARDS: Yes, I see.
 11 MR GARDINER: -- then you could say from every single day
 12 I've got a little bit of 8 per cent accruing day-by-day.
 13 LORD JUSTICE DAVID RICHARDS: Yes, I follow.
 14 LADY JUSTICE GLOSTER: But why isn't there -- I see that
 15 obviously -- why isn't there a contingent right?
 16 MR GARDINER: Because there isn't for the reason my Lord
 17 said at paragraph 154. There's simply no right.
 18 LORD JUSTICE DAVID RICHARDS: You might say in one sense
 19 there's a contingent right -- perhaps there is
 20 a contingent right -- but because it is contingent,
 21 nothing is accruing. I think that was perhaps the
 22 point.
 23 LADY JUSTICE GLOSTER: It seems to me there is at least the
 24 possibility of a future right which could be
 25 characterised as a contingent right, but that doesn't

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1 necessarily mean it's accruing.
 2 MR GARDINER: That's right, my Lady.
 3 LADY JUSTICE GLOSTER: The fact that there is a possibility
 4 of a surplus and that if there is you will have a right
 5 to be paid interest out of it is presumably why my Lord
 6 and why we agreed that there was no accrual.
 7 MR GARDINER: That's right, and I mean you don't accrue for
 8 a mere possibility in the future. This word "accrue" is
 9 actually really quite important in the sense --
 10 LADY JUSTICE GLOSTER: It has been taken out of the statute.
 11 MR GARDINER: Your Ladyship is absolutely right. It was
 12 taken out of the statute in 2007. Prior to that --
 13 I have been a tax lawyer all my professional life,
 14 I live with this terminology -- you can start with the
 15 1803 Addington's Act and you can look at all the
 16 schedules, and in particular at schedule D, and it
 17 always start on the basis of income arising or accruing.
 18 Those were the words that were there for two centuries
 19 and that's why judges talk in the terms of accruing, and
 20 we talk as a matter of English "with interest accruing".
 21 LORD JUSTICE DAVID RICHARDS: But the the removal of
 22 "accruing" was part of the rewrite, so presumably the
 23 view was formed that in this context, accruing was
 24 synonymous with arising, whereas the word accruing can
 25 have a different connotation. There is a danger of sort

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1 of sliding between meanings here.
 2 MR GARDINER: Yes.
 3 LORD JUSTICE DAVID RICHARDS: We talk about interest
 4 accruing over a period, but it's used as arising or
 5 accruing. I'm not convinced the word accruing is
 6 necessarily being used or was being used in the sense of
 7 accruing over a period, but I appreciate it's your
 8 submission that it is. But that's in a sense the big
 9 question here.
 10 MR GARDINER: It may be we come down to at the end of the
 11 day, my Lord. It's actually the final paragraph of our
 12 appendix to our skeleton, which is the very point
 13 your Lordship is putting to me at the moment. Perhaps
 14 I could just remind you of that by reading it out.
 15 Paragraph 17.
 16 LADY JUSTICE GLOSTER: We've read it. You don't need to
 17 read it out.
 18 MR GARDINER: I'm grateful, my Lady.
 19 LADY JUSTICE GLOSTER: In a way arising is more supporting
 20 your position, because accruing you can have the idea of
 21 notional accrual, whereas arising it's a bit more
 22 difficult to think in terms of notional -- for my part
 23 of notional arising.
 24 MR GARDINER: I would accept that. The only point I am
 25 making is perhaps in answer to my Lord

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1 Lord Justice David Richards's first point. The whole
 2 point of the tax law rewrite was to simplify the
 3 language. It wasn't to actually change the basis of the
 4 (inaudible).
 5 I think what one can say is they are using the terms
 6 arising on the basis that will cover everything. But
 7 I don't want to go into greater issues than that, but
 8 accruals as a basis is something we still use as
 9 a matter of accounting, accruals basis of accounting.
 10 I suspect all those speaking in this particular court
 11 when practising at the bar probably dealt with their tax
 12 affairs on a cash basis, but then we all moved over
 13 to --
 14 LADY JUSTICE GLOSTER: An accrual.
 15 MR GARDINER: -- accounts arising on an accruals basis.
 16 I have to accrue in respect of the work I do. Whether
 17 I receive money or not, I have to accrue, I have to take
 18 into account the increased value that I have in that
 19 particular year.
 20 Now that's what all this is about and it explains
 21 why the deduction of tax at source was applied to yearly
 22 interest and is still only applied to yearly interest.
 23 Deduction of tax at source was applied to yearly
 24 interest from 1803 and applied only to yearly interest
 25 for 85 years. I'll come on to the other forms of

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1 deduction of tax at source.
 2 From 1969, it now only applies to yearly interest.
 3 And the point of that is this: they were looking at
 4 a species of investment instrument -- that's what all
 5 these cases are talking about -- that has some kind of
 6 permanence, is going on, is going into the future. So
 7 for example, as my learned friend said, you will get
 8 payments of interest perhaps quarterly or monthly or
 9 six-monthly or yearly or whatever, but it's looking at
 10 something flowing forward that you then deduct tax when
 11 payments are made from time to time in respect of income
 12 which is accruing throughout that period.
 13 LADY JUSTICE GLOSTER: I think I would be grateful for
 14 a list of the indicia which you say demonstrates
 15 something is yearly interest. What are we looking at?
 16 MR GARDINER: You are looking at something of some
 17 permanence in the nature of an investment which is
 18 intended to go forward.
 19 LORD JUSTICE PATTEN: I mean, in one sense, all interest,
 20 all species of interest accrue.
 21 MR GARDINER: I find it quite difficult to answer
 22 your Lordship's question, in a sense. In the ordinary
 23 case, yes, but what we have here is something which is
 24 declared by Parliament to be interest.
 25 LORD JUSTICE PATTEN: Yes, but are the words "arising" and

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1 "accruing" historically only used in connection with
 2 yearly interest? I suspect the answer is no.
 3 MR GARDINER: No. The answer to your Lordship's question is
 4 schedule D from 1805 brought in to charge interest that
 5 wasn't yearly interest.
 6 LORD JUSTICE PATTEN: Yes.
 7 MR GARDINER: So yearly interest and non-yearly interest
 8 were charged.
 9 LORD JUSTICE PATTEN: So all species of interest for tax
 10 purposes are treated as accruing.
 11 MR GARDINER: Well, I find the difficulty of this particular
 12 interest because it doesn't accrue over time --
 13 LORD JUSTICE PATTEN: Never mind about this particular, I am
 14 just trying to identify the animal we're talking about
 15 more generally than that.
 16 I mean, the essence of your case as accepted by the
 17 judge is point 1 in paragraph 34: statutory interest
 18 doesn't accrue from day-to-day, not payable from year to
 19 year. So if one looks at that -- if that's good, then
 20 I would assume it applies to all types of interest
 21 because all types of interest for tax purposes are, for
 22 the reasons I've just put to you, treated under the
 23 statute as accruing or arising.
 24 MR GARDINER: Well, look perhaps -- I can see where
 25 your Lordship is making the point. What I would say is

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1 that the animal to which deduction of tax at source was
 2 aimed was something which had a continuum over a period
 3 of time, and that's why deduction of tax at source was
 4 thought appropriate. If it doesn't accrue over time,
 5 then it doesn't really have that quality.
 6 Your Lordship may well be right; to be brought
 7 within the charge there may have been an argument that
 8 if something which is a one-off doesn't necessarily
 9 accrue, it might just arise.
 10 LORD JUSTICE PATTEN: All I am trying to get clear,
 11 Mr Gardiner, is whether this argument the judge accepted
 12 that statutory interest has no period of accrual doesn't
 13 accrue from day-to-day, and so on and so forth,
 14 disqualified it from being interest or disqualified it
 15 from being yearly interest.
 16 MR GARDINER: It disqualifies it from being yearly interest,
 17 my Lord.
 18 LORD JUSTICE PATTEN: Why doesn't it also disqualify it from
 19 being interest?
 20 MR GARDINER: Because it is something which arises but it
 21 doesn't accrue.
 22 LORD JUSTICE PATTEN: Well --
 23 MR GARDINER: It arises because the statute says you've got
 24 to pay it and it arises on the date on which there is a
 25 determination of the surplus.

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1 LORD JUSTICE PATTEN: But if the statute is using that
 2 language of "arising" to replace "arising or accruing",
 3 it's treating interest of all kinds as accruing and then
 4 the deductions only apply if it's yearly interest.
 5 MR GARDINER: My Lord, as I read it, the "arising" is
 6 a wider word than "accruing". It therefore encompasses
 7 interest which accrues and interest which arises. The
 8 interest here arises because it's created by the statute
 9 and the surplus has arisen, so it's arising. But what
 10 I am saying is that historically every single case which
 11 has actually held that the deduction at source for
 12 yearly interest applies has been a situation where the
 13 courts have identified something of some permanence,
 14 some longevity going on in the nature -- I mean, it's
 15 Garston, Mr Justice Rowlatt says of an investment or
 16 something of that nature. That must mean it's
 17 an instrument which gives rise to growing interest over
 18 the year or years of assessment.
 19 LADY JUSTICE GLOSTER: Whereas here it could have been paid,
 20 theoretically at any rate, on the date of the
 21 ascertainment of the surplus.
 22 MR GARDINER: Theoretically, yes.
 23 LADY JUSTICE GLOSTER: With no intention going forward that
 24 these monies should be left outstanding.
 25 MR GARDINER: It's simply a calculation of the past and if

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1 this was a small administration and whatever, the funds
 2 were there, they ascertain the surplus and pay out
 3 perhaps to one creditor on that day. It's simply
 4 a one-off calculation. It's got no tract of future
 5 time, it's got nothing of permanence of something
 6 growing --
 7 LADY JUSTICE GLOSTER: What do you mean tract of future
 8 time?
 9 LORD JUSTICE DAVID RICHARDS: It's the Scottish quote, isn't
 10 it?
 11 MR GARDINER: Yes, it's Scottish North American Trust v
 12 Farmer, Lord Johnston. The tract of future time, as
 13 I apprehend what he is saying, is that you've got to
 14 find something that is ongoing, it's going forward --
 15 LORD JUSTICE PATTEN: Yes, that's to deal with cases where
 16 at the date of payment you don't know how long it's
 17 going to go on for, so you've got to find some way of
 18 distinguishing between short-term arrangements and
 19 long-term ones.
 20 MR GARDINER: Well, yes, but what I am saying is that every
 21 single case that has actually dealt with the question of
 22 yearly interest has actually relied on -- or that kind
 23 of concept of some kind of permanence, investment
 24 (inaudible) all that kind of stuff, tract for future --
 25 LORD JUSTICE PATTEN: But you know why I'm asking these

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1 questions because that would be fine if for tax purposes
 2 you could never have yearly interest at all if what you
 3 were dealing with was an award of interest so called
 4 retrospectively for a past period under circumstances
 5 where there was no right to the interest at the
 6 beginning of that period. But it's pretty clear from
 7 the Riches case that that is not an obstacle to it being
 8 interest, whatever may be the position about yearly
 9 interest.
 10 MR GARDINER: Well, yes, but that case was simply about
 11 whether it's interest or not.
 12 LORD JUSTICE PATTEN: Yes, but if it's interest, you've
 13 already got to the situation in this case where the
 14 statutory interest which is awarded on the same basis
 15 retrospectively is interest within the meaning of
 16 section 874.
 17 MR GARDINER: But the difference with Riches, Regal Hastings
 18 v Gulliver and Barlow are that they are completely
 19 misleading cases.
 20 LADY JUSTICE GLOSTER: Why?
 21 MR GARDINER: For this reason, my Lady; if I take them in
 22 the order in which they --
 23 LADY JUSTICE GLOSTER: From my part, you've got to explain
 24 why Regal Hastings isn't analogous.
 25 MR GARDINER: Can I start with Barlow because it's easier to

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1 understand Regal Hastings if I deal with Barlow first.
 2 In 1923, Mr Barlow committed a breach of trust.
 3 LADY JUSTICE GLOSTER: What tab are we?
 4 MR GARDINER: Barlow is at -- I'm sorry, yes, perhaps we'd
 5 better look at it -- tab 12. In 1923, the appellant --
 6 if you look at the headnote:
 7 "One of the trustees of certain settlements which
 8 had been ...(Reading to the words)... the proceeds in
 9 his own name in unauthorised securities which
 10 subsequently fell in value."
 11 If I just pause there. That was a breach of trust.
 12 As at that moment, he was obliged to repay the value
 13 that he had taken out of the trust fund and on the
 14 authorities to treat it as an investment at a rate of
 15 interest on that investment at 5 per cent. That's
 16 a case the judge refers to called Vyse v Foster, a very
 17 famous case, also in our bundle of authorities.
 18 LORD JUSTICE DAVID RICHARDS: He was obliged to repay and
 19 treat it as --
 20 MR GARDINER: An investment carrying interest at 5 per cent
 21 from 1923.
 22 LADY JUSTICE GLOSTER: But in fact the obligation came under
 23 the deed which he'd entered into with the trustees to
 24 repay it.
 25 MR GARDINER: My Lady, no.

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<p>1 LADY JUSTICE GLOSTER: Right. I am just looking at the 2 headnote. 3 MR GARDINER: The deed correctly recites the fact that he 4 was already liable to repay it. 5 LADY JUSTICE GLOSTER: Right, okay. 6 LORD JUSTICE DAVID RICHARDS: You say that from 1923 7 onwards -- is this right? -- interest was accruing at 8 the rate of 5 per cent. 9 MR GARDINER: My Lord, yes. 10 LADY JUSTICE GLOSTER: But the beneficiaries had election. 11 They were not required -- beneficiaries have a choice of 12 remedy. They don't have to take the capital sum plus 13 interest at 5 per cent. If there had been profits, they 14 could have taken the profits. 15 MR GARDINER: I think it comes back, yes, to what 16 Lord Justice James says in the case of Vyse v Foster. 17 LORD JUSTICE DAVID RICHARDS: They have a choice. 18 MR GARDINER: But insofar as they get interest, they have 19 a right from the date of the breach of trust in 1923 to 20 have the principal sum back and interest accruing on 21 that principal sum from 1923. 22 LORD JUSTICE DAVID RICHARDS: At what rate? 23 MR GARDINER: It's at 5 per cent. 24 LORD JUSTICE DAVID RICHARDS: The law permitted no other 25 rate?</p> <p style="text-align: center;">Page 113</p>	<p>1 MR GARDINER: Could we look very briefly at the case of 2 Vyse v Foster at tab 2 -- it's actually referred to by 3 Mr Justice Finlay in this case. It's a very well known 4 passage, behind tab 2, Vyse v Foster, Lord Justice James 5 giving the judgment of the Court of Appeal in 1873, 6 I think. The passage is at the top of page 7 in the 7 report, and the third line down towards the right-hand 8 side of the page says: 9 "If an executor commits a breach of trust he and all 10 those who are accomplices ...(Reading to the words)... 11 made to appear what profits are attributable to such 12 employment, he must account for trade interest, that is 13 to say interest at 5 per cent." 14 LORD JUSTICE DAVID RICHARDS: That actually does make the 15 point I was making that the beneficiaries have a choice. 16 MR GARDINER: Yes. 17 LORD JUSTICE DAVID RICHARDS: How does the trustee know that 18 he is -- how can it be said that interest is accruing at 19 a particular rate if the trustee doesn't know what 20 remedy the beneficiaries will elect? 21 MR GARDINER: Because the trustee or the person in the 22 position of a trustee knows he's got a liability at 23 either 5 per cent or some other figure. 24 LORD JUSTICE DAVID RICHARDS: Some other figure might be the 25 profits he makes.</p> <p style="text-align: center;">Page 115</p>
<p>1 MR GARDINER: Well, that's what Lord Justice James says in 2 the case of Vyse v Foster. 3 LORD JUSTICE DAVID RICHARDS: But the rate of interest at 4 which equity is awarded for breach of interest has 5 varied significantly over the years. The trustee 6 wouldn't know during the period of his default what rate 7 of interest he is going to have to pay. 8 MR GARDINER: My point is this simply this: there was 9 an amount of principal owed because of the breach of 10 trust and interest was accruing on it. 11 LORD JUSTICE DAVID RICHARDS: You say it was accruing but 12 I'm asking you at what rate? You say 5 per cent and 13 I am asking is that right? Is that figure set in stone 14 as in the Judgments Act? Because I think there are 15 a series of cases in which the courts have discussed and 16 reached decisions as to the appropriate rate of interest 17 to award in respect of a claim for breach of trust, and 18 it's -- I thought actually for many years it was 19 4 per cent, but it certainly in the last 30 years or so 20 has not been at that rate, and a number of different 21 rates have been used, depending on economic 22 circumstances. 23 So I'm finding this quite difficult that the trustee 24 would know during the period of his default the interest 25 that he's liable to pay.</p> <p style="text-align: center;">Page 114</p>	<p>1 MR GARDINER: The other figure might be more than 5 per cent 2 and therefore he would assume that the beneficiaries 3 will go for the higher figure. But he must know that at 4 the minimum he's got a liability of 5 per cent. 5 LORD JUSTICE DAVID RICHARDS: But if his liability is going 6 to be to account for profits, no interest has accrued at 7 all. 8 MR GARDINER: Well -- 9 LORD JUSTICE DAVID RICHARDS: What the Chancery court would 10 do, they might award interest on the profits from the 11 time the trustee earned them. But that would be a quite 12 different rate of accrual. I am having some difficulty 13 in this explanation of Regal Hastings and the earlier 14 case, as you'll see. 15 MR GARDINER: I think the two cases of Barlow and Regal 16 Hastings are in the like position. That's why I was 17 starting with Barlow, because in Regal Hastings you've 18 got a situation where they invested in the company, they 19 then made profits from the sale of the shares in the 20 company and then it was a question that they had 21 a liability to make good to the original shareholders 22 those profits with interest on it. 23 LORD JUSTICE DAVID RICHARDS: Yes. 24 MR GARDINER: Yes. What I would say is if one is looking 25 and talking in terms of accruals, if and insofar as one</p> <p style="text-align: center;">Page 116</p>

<p>1 has interest, one is looking at interest which has been 2 accruing on a principal sum from the outset. 3 LORD JUSTICE DAVID RICHARDS: But I mean, I come back to 4 this 5 per cent. This was trade interest I think, but 5 if it weren't trade interest, the general rate was 6 4 per cent. But those rates have changed. 7 MR GARDINER: Mm-hm. 8 LORD JUSTICE DAVID RICHARDS: As I say, there are a number 9 of authorities over the last 30 or so years where this 10 has been discussed. So how can you say that interest is 11 accruing over a period when you don't know what the rate 12 of interest is? 13 MR GARDINER: I would say that interest is accruing and even 14 though you don't know the rate, you know interest is 15 accruing. 16 LORD JUSTICE DAVID RICHARDS: What does it mean that 17 interest is accruing if you don't know the rate? 18 MR GARDINER: It means there is an amount of interest 19 accruing day by day by day. 20 LORD JUSTICE DAVID RICHARDS: But you don't know how much. 21 MR GARDINER: You could probably -- 22 LORD JUSTICE DAVID RICHARDS: All you know is that you will 23 become under a liability to pay interest if a claim for 24 breach of trust is made and succeeds. 25 MR GARDINER: Yes, but --</p> <p style="text-align: center;">Page 117</p>	<p>1 compound, you don't know what the rests are. It's quite 2 an odd situation to say that interest is nonetheless 3 accruing. 4 MR GARDINER: My Lord, I can see the point you are making, 5 if I try and answer it in this way: as at the date of 6 the breach of trust, a liability is incurred. That is 7 a situation at the outset. That is completely different 8 to the situation here, because here a liability is not 9 incurred at the outset at the beginning of the period of 10 calculation. The only liability that is ever incurred 11 is after the repayment of the principal, is 12 an ex post facto calculation in respect of the past. So 13 the only liability arises after the repayment of the 14 principal. 15 Therefore, you can't say there is anything accruing 16 on the principal from the date on which the principal, 17 the proved debt, was entered in the administration 18 because there's no liability of that -- 19 LORD JUSTICE DAVID RICHARDS: Well, you'll understand that 20 I agree entirely with you on that. 21 MR GARDINER: My Lord, with the greatest respect, that's the 22 key to it. That's why these cases don't get the -- 23 LORD JUSTICE DAVID RICHARDS: I am turning it round, I'm 24 afraid. What I want you to address is not the question 25 you've just addressed, which is the one where as you</p> <p style="text-align: center;">Page 119</p>
<p>1 LORD JUSTICE DAVID RICHARDS: It's contingent on it being 2 a breach of trust, what you are doing. But then you 3 know that at the election of the beneficiaries, you will 4 be liable to pay interest, but they may elect for 5 something else. 6 MR GARDINER: My Lord, the fundamental difference between 7 that situation and the situation we have here is that 8 you know there's been a breach of trust in Barlow -- 9 LORD JUSTICE DAVID RICHARDS: Well, you do once there has 10 been either a trial as there was in Regal Hastings -- 11 remember it was only in the House of Lords and then by 12 a majority -- no, I'm sorry, I've misunderstood it. It 13 was only once the House of Lords gave its decision that 14 it was established there was a breach of trust. I think 15 it was only in the House of Lords that the breach of 16 trust was established. 17 MR GARDINER: My Lord, that's right. Your Lordship is -- 18 LORD JUSTICE DAVID RICHARDS: But you are right, that goes 19 back, but you would say that has the effect of interest 20 accruing. But I just find it difficult to understand 21 how you can say that interest is accruing during that 22 period when you don't know the sum on which the interest 23 will be awarded, you don't know the rate at which it 24 will be awarded, and just to add to the mix, you don't 25 know if it's going to be compound or simple. And if</p> <p style="text-align: center;">Page 118</p>	<p>1 know I agree with you because you've seen my judgment. 2 The question I'm directing your attention to is: how do 3 you say interest accrues in the breach of trust cases 4 during the period of the -- 5 MR GARDINER: Simply because you know there is a principal 6 sum on which there is an amount -- if I use just that 7 term -- an amount of interest which is growing. You may 8 not know whether it's 4 per cent or 4.5 per cent or 9 5 per cent -- 10 LORD JUSTICE DAVID RICHARDS: So you know there is 11 a principal sum -- 12 MR GARDINER: There is a principal sum -- 13 LORD JUSTICE DAVID RICHARDS: -- on which interest is 14 accruing at an unknown rate. 15 MR GARDINER: Accruing, that's right. 16 LORD JUSTICE DAVID RICHARDS: It doesn't matter what the 17 rate is, but it's a rate which may not be known. 18 MR GARDINER: Yes. Therefore, you have a growing amount of 19 income day-by-day, year-by-year on something of some 20 permanence that you can then say the terminology of 21 yearly interest is applicable to. 22 LADY JUSTICE GLOSTER: That is so, is it, even though as at 23 the date of breach of trust, i.e. the investment in 24 unauthorised investments and going forward for, say, 25 a year, there is no loss arising from the breach of</p> <p style="text-align: center;">Page 120</p>

<p>1 trust because the unauthorised investments are returning 2 a much higher income than that which the authorised 3 investments would have returned. 4 MR GARDINER: My Lady, with respect, in those circumstances 5 you wouldn't have any interest at all, would you? 6 LORD JUSTICE DAVID RICHARDS: That's the point. 7 If in those circumstances you would have no 8 interest, how are you able to say that interest is 9 accruing in that period? 10 MR GARDINER: Because I'm looking at the two cases of Barlow 11 and Regal Hastings v Gulliver. In Barlow, he took the 12 monies out and immediately invested them and 13 demonstrated that he'd made a loss on day 1. 14 LADY JUSTICE GLOSTER: No, it doesn't demonstrate it made 15 a loss on day 1. It's only subsequently that the 16 unauthorised investments go down in value. You won't 17 know on day 1. He thought on day 1 his unauthorised 18 investments were going to do much better, that was the 19 whole point. I mean, they didn't ... 20 MR GARDINER: My Lady, I am sure you are right. I am just 21 trying to find the -- 22 LADY JUSTICE GLOSTER: Look at page 359. There was 23 certainly a breach of trust, but there is no actual loss 24 until the unauthorised investments don't return, and we 25 don't know the details. I mean, if you look at the</p> <p style="text-align: center;">Page 121</p>	<p>1 liable ...(Reading to the words)... a sum not greater 2 than £35,424 in the aggregate the said sums of £27,020 3 and £7,000 ..." 4 LADY JUSTICE GLOSTER: You can see it's from 1930, isn't it? 5 MR GARDINER: Yes. So in 1930, they are saying between 1923 6 and 1930, there has actually been a loss of that 7 principal amount, and they say he is at that date -- 8 recites as at the date of that deed. So it's not the 9 deed that creates it, they recite as at the date of that 10 deed, he is obliged to pay that £35,000-odd with 11 interest thereon. 12 LORD JUSTICE DAVID RICHARDS: The 35,000 is an aggregate of 13 the principal, isn't it, plus interest from 1923 up to 14 the date of the deed and interest thereafter? 15 MR GARDINER: And interest thereon, yes. 16 LORD JUSTICE DAVID RICHARDS: Let's just suppose that from 17 1923 to 1926 the unauthorised investments were going up 18 in value. During that period, is it right to say that 19 he had a liability to repay the principal sum plus 20 interest and that interest was accruing day-by-day? 21 MR GARDINER: No, because there wouldn't have been any 22 interest in those circumstances. It's only where you 23 get a situation where there is a breach of trust and you 24 can see there is an amount of money that's got to be 25 repaid for breach of trust, and then you get interest</p> <p style="text-align: center;">Page 123</p>
<p>1 middle: 2 "Which the unauthorised securities which 3 subsequently fell in value." 4 MR GARDINER: My Lady, you are right. I'm sorry, yes. 5 LADY JUSTICE GLOSTER: So you don't -- okay, there's 6 a breach of trust, but there's no loss until arising 7 from the breach of trust. And it may have been the case 8 that they were paying quite happily, thank you. 9 MR GARDINER: Yes. There is a pretty substantial loss in 10 fact which incurred, and that's on which the interest is 11 treated as arising. 12 LADY JUSTICE GLOSTER: Yes, and it's the diminution in the 13 value of the trust fund on which the interest is 14 payable. 15 MR GARDINER: Yes. 16 LADY JUSTICE GLOSTER: But it's only once that loss occurs 17 that there is a capital fund in relation to which 18 interest is liable to be paid or alternatively 19 an account of profits. 20 MR GARDINER: Yes, and I think the point I was trying to 21 make -- and I didn't make it very well -- is 22 subsequently on that page if one looks at the recital to 23 the deed, it's about 10 lines up from the end of the 24 page. The recital goes on: 25 "And whereas it is apprehended that the settlor is</p> <p style="text-align: center;">Page 122</p>	<p>1 accruing on it. 2 You can see if you just look at page 360 over the 3 page and the middle of that paragraph which has been 4 sidelined as well, about seven or eight lines down from 5 the paragraph beginning: 6 "Now what really happened was this. The question 7 raised in this appeal was ...(Reading to the words)... 8 the sum of £7,704." 9 So that was the amount which in my terminology at 10 least had accrued prior to the date of the deed and was 11 recognised as a liability that had accrued prior to the 12 date of the deed. 13 LORD JUSTICE PATTEN: But as my Lady said, the taxable 14 payment of interest arose under the deed. I mean, 15 I know you say the deed simply acknowledged that there 16 was a pre-existing liability, and so it did, but the 17 actual liability which gave rise to the payment was the 18 deed. 19 MR GARDINER: Well, my Lord, why don't we look at it this 20 way -- and this is an attempt to answer your Lordship's 21 question, I am not trying to not answer it. 22 But say there was a deed and he simply said, "All 23 right I'm aware I've been in breach of trust. I've 24 calculated the principal amount is this and the interest 25 on it is this, I'll pay it". There's no magic in the</p> <p style="text-align: center;">Page 124</p>

1 deed, it's simply an acceptance of an existing
 2 liability.
 3 LORD JUSTICE DAVID RICHARDS: The deed -- I mean, this was
 4 a compromise, the deed, so in that sense it's no
 5 different from a judgment as in Regal Hastings. The
 6 source of the obligation to pay is either the judgment
 7 or the compromise entered into by the parties before or
 8 during the proceedings which avoids the need for
 9 a trial.
 10 MR GARDINER: My Lord, your Lordship --
 11 LORD JUSTICE DAVID RICHARDS: You are right, you wouldn't
 12 need a deed, you could do it by exchange of solicitors
 13 correspondence and the payment of the money. But it
 14 doesn't make a difference whether it's a contract,
 15 a deed or a judgment; it's the same point in each case.
 16 MR GARDINER: My Lord, that I would accept. But what is
 17 said against me, as I understand it, is that the payment
 18 is a payment which only arises in consequence of
 19 judgment of the court.
 20 LORD JUSTICE DAVID RICHARDS: Yes, or the deed.
 21 MR GARDINER: Or the deed, yes. That's what is said --
 22 LORD JUSTICE DAVID RICHARDS: That is what is said against
 23 you, yes.
 24 MR GARDINER: I say that's not right. I say the source of
 25 the payment is the original liability, the deed

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1 recognised at -- as in Regal Hastings v Gulliver, the
 2 court recognised that. All the House of Lords did in
 3 that case was to say: there is a liability you have for
 4 breach of trust or breach of your fiduciary duty.
 5 You've got to disgorge the profit and disgorge the
 6 profit with interest on it.
 7 LORD JUSTICE DAVID RICHARDS: It's the court which fixes the
 8 rate of interest in its discretion.
 9 MR GARDINER: Well, most of the -- one has to look at
 10 whether the statute in that particular case had
 11 a discretion or subsequently for example in personal
 12 injuries matters.
 13 LORD JUSTICE DAVID RICHARDS: Well, I think in Regal
 14 Hastings it was agreed between the parties -- and I've
 15 no reason to doubt -- that the House of Lords was
 16 exercising the equitable jurisdiction to award interest,
 17 and given that -- yes, 4 per cent was in those days the
 18 accepted rate. But that's nothing to do with -- well,
 19 the 1934 Act does of course confer a discretion, but
 20 clearly the jurisdiction to award equitable interest is
 21 discretionary: whether to award it at all and if so at
 22 what rate, and whether to make it simple or compound,
 23 and if compound at what rests. All that is for the
 24 court to decide or for the parties to agree in order to
 25 avoid court proceedings.

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1 MR GARDINER: Yes. But my Lord, surely ordinarily in
 2 circumstances where there's been a clear breach of
 3 trust, it is going to be inevitable that the court will
 4 award interest and then there's good reason --
 5 LORD JUSTICE DAVID RICHARDS: Probably you are right, but
 6 there could be plenty of scope for argument about the
 7 rate of interest and there could be quite a bit of scope
 8 for whether the case demands simple or compound
 9 interest.
 10 MR GARDINER: But that goes back to the point I was making
 11 earlier, my Lord: there may be an argument about the
 12 rate but what is in my submission inescapable is that
 13 there was in reality a liability --
 14 LORD JUSTICE DAVID RICHARDS: In reality as opposed to in
 15 law.
 16 MR GARDINER: No, in law. I'm sorry, I am not suggesting
 17 otherwise.
 18 LORD JUSTICE DAVID RICHARDS: How do you have a liability to
 19 pay interest when you don't know what the rate is?
 20 MR GARDINER: I think you can because --
 21 LORD JUSTICE DAVID RICHARDS: You may have -- sorry, go on.
 22 MR GARDINER: You've got an obligation to pay an amount of
 23 interest which may have to be determined by arbitration
 24 or by the court or whatever. But you know you've got
 25 an obligation to pay an amount of interest, you know

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1 you've got an obligation to pay an amount of interest.
 2 Therefore, for taxing purposes -- that's the
 3 importance here -- for taxing purposes you've actually
 4 got a growing amount of income in a year of assessment,
 5 the species of instrument that these cases actually are
 6 looking at, and looking at ongoing investments that have
 7 income accruing that constitutes yearly interest.
 8 Could I just in that context make two points.
 9 It is clear from the history of our taxation, and it
 10 is as clear today as it was back in 1803, that tax law
 11 recognises a distinction between "yearly interest" and
 12 other "interest". There's no doubt about that and
 13 I don't think that's disputed.
 14 Secondly, if one is looking at what constitutes
 15 "yearly interest", and as with every single tax case
 16 there ever is it always comes back down to the meaning
 17 of words in a statute, but the words we have are "yearly
 18 interest", and one has to ask oneself what those words
 19 ordinarily mean. The ordinary meaning of "yearly" is
 20 "year-by-year" or "annual", so that is actually starting
 21 one on the route that all the cases have recognised,
 22 realising that one is looking at something that has some
 23 continuance. So whether there's any argument about
 24 section 874 having dropped the word "accruals" or
 25 whatever, one has got the terminology "yearly interest"

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1 and one is talking about something with a degree of
 2 continuance, simply by reference to that word, and
 3 that's what the older cases and the judges -- and it's
 4 very celebrated judges -- were recognising.
 5 As my learned friend said, if you want to go on and
 6 ask yourself what does interest mean, he used the
 7 classic definition in all the tax cases, it's "payment
 8 by time for the use of money". We do not have it in the
 9 bundle of authorities but it's a very well known phrase,
 10 it's Mr Justice Rowlatt in a case called
 11 Bennett v Ogston. I can give you the reference, in fact
 12 we actually have copies with us if that would be --
 13 I don't think you'll find the rest of the case
 14 particularly interesting, but it's just the phrase
 15 "payment by time for the use of money". It's 15 tax
 16 cases, I think it's 364.
 17 LADY JUSTICE GLOSTER: You are going to let us have Barnato
 18 as well, are you?
 19 MR GAMMIE: I can hand it up now.
 20 MR GARDINER: Shall we perhaps hand the two in at close of
 21 play?
 22 LADY JUSTICE GLOSTER: Yes.
 23 MR GARDINER: So "yearly", "year-by-year" or "annual",
 24 connoting therefore some form of continuance, and
 25 therefore it's got to be a continuance constituting

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1 interest which is talking about payment by time for the
 2 use of money.
 3 That is not what you have here. You do not have any
 4 continuing, growing right to interest, you have
 5 a one-off calculation in respect of the past.
 6 LADY JUSTICE GLOSTER: But it may be a one-off calculation
 7 and it's paid once, presumably, although it wouldn't
 8 have to be paid once, it could have been paid as
 9 everybody was going along, perhaps --
 10 MR GARDINER: Well, it couldn't have been paid before the
 11 principal was repaid, my Lady, could it?
 12 LADY JUSTICE GLOSTER: No. But there had to be the clear
 13 determination that there was a surplus. Then some bit
 14 of it could have been paid leaving always enough for
 15 a reserve for any withholding that had to be made. So
 16 it is calculated by reference to the use of money over
 17 time.
 18 MR GARDINER: It's calculated by reference to a past period.
 19 LADY JUSTICE GLOSTER: Yes.
 20 MR GARDINER: But it's not paid for the use of that money
 21 over that period of time, it's paid because there is
 22 a surplus, it's a means of distributing that surplus.
 23 LORD JUSTICE DAVID RICHARDS: Well, doesn't it fall within
 24 what Lord Wright said in Riches as being a payment which
 25 becomes due because the creditor has not had his money

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1 at the due date?
 2 MR GARDINER: That case in Riches, my Lord, they were simply
 3 talking about interest of money, they weren't talking
 4 about yearly interest.
 5 LORD JUSTICE DAVID RICHARDS: Your argument seemed to be
 6 veering back towards interest rather than focusing on
 7 yearly.
 8 MR GARDINER: I'm sorry, but Riches, as far as I'm
 9 concerned, is basically irrelevant.
 10 LORD JUSTICE DAVID RICHARDS: All right, because your focus
 11 is on yearly.
 12 MR GARDINER: Yes, yes.
 13 LORD JUSTICE DAVID RICHARDS: If it said "interest" here
 14 then you would accept that --
 15 MR GARDINER: There wouldn't have been any question.
 16 LORD JUSTICE DAVID RICHARDS: Quite, it's the word "yearly"
 17 that takes the burden.
 18 MR GARDINER: It's fundamental.
 19 LORD JUSTICE DAVID RICHARDS: And that's what suggests
 20 a continuum, as you say, year-by-year accretion.
 21 MR GARDINER: Yes. And I'll come back to what the learned
 22 judge below said, but that is the basis of his judgment.
 23 That, in a sense, is the starting point, the meaning
 24 of the words "yearly interest". I made that point and
 25 I don't want to elaborate on it, but what I do want to

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1 say is that that gives one the raison d'etre for why it
 2 was yearly interest from the outset to which a deduction
 3 at source obligation applies. One does get quite a lot
 4 of help, in our respectful submission, from the history
 5 of these matters, the history of two centuries of tax
 6 legislation. We've set that out in the appendix to our
 7 skeleton, and I would like to come back to that in
 8 a moment. But if I just make it shortly. It is really
 9 quite remarkable that -- I mean, income tax started in
 10 this country in 1799 in the Pitt's Act, which wasn't
 11 a great success, and that was repealed in 1802 after the
 12 Treaty of Avignon; but 1803 Addington's Act, set out the
 13 fundamental structure of our income tax which is still
 14 with us two centuries later today. If I just make this
 15 point, I mean the schedule and system of taxation in the
 16 UK, we can all remember this historically which is
 17 schedule A, schedule B, schedule C, schedule D.
 18 Schedule D, there are various cases of it, the first
 19 one, trades, profit arising and accruing from the
 20 carrying on of a trade; case 2 of schedule D, but no
 21 longer called the case, professions or vocations; case
 22 3, interest of money. The opening words it's always
 23 talking about "income arising or accruing".
 24 Now, the tax law rewrite operation in 2007 got rid
 25 of the terminology "A, B, C, D and E", but it still

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1 actually has the same separate heads of taxation that
 2 were recognised basically back in 1803.
 3 LADY JUSTICE GLOSTER: Where does that take us?
 4 MR GARDINER: Where it takes us, my Lady, is this. That
 5 "income arising and accruing" has been standard
 6 terminology throughout. I say that the tax law rewrite
 7 simplification of language is not intended to make any
 8 structural change. Yearly interest is recognised as
 9 this animal which constitutes a continuum, there is no
 10 reason to think that the cases that identify what is the
 11 concept of yearly interest are not applicable today as
 12 they were in 1853, 1890, 2010.
 13 LADY JUSTICE GLOSTER: Are you going to give us Bennett and
 14 Barnato?
 15 MR GARDINER: Yes, Bebb v Bunny. Barnato we can only give
 16 you tomorrow.
 17 LADY JUSTICE GLOSTER: No, we have Barnato, Mr Gammie has
 18 Benarto.
 19 MR GARDINER: Shall I hand them in? Can I deal with it
 20 tomorrow?
 21 LADY JUSTICE GLOSTER: Speaking for myself, I might quite
 22 like to read it overnight.
 23 MR GARDINER: We'll certainly hand them in.
 24 LADY JUSTICE GLOSTER: You don't need to deal with it now.
 25 MR GARDINER: A shorter proposition in respect of it

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1 tomorrow.
 2 LADY JUSTICE GLOSTER: Yes.
 3 MR GARDINER: If we could hand them in. (Handed)
 4 LADY JUSTICE GLOSTER: You can hand up Bennett at the same
 5 time.
 6 MR GARDINER: Yes. (Handed)
 7 LADY JUSTICE GLOSTER: Thank you.
 8 MR GARDINER: So the significance of the historic approach
 9 towards it is what was the rationale for having
 10 a deduction at source procedure? One of the points we
 11 make in the appendix to our skeleton is that yearly
 12 interest started off, in a phrase, referring to
 13 "annuities, yearly interest or other annual payments".
 14 One can see that, and perhaps we ought to just look at
 15 it, it's section 208, it's in the legislation bundle,
 16 tab 4.
 17 If I just start with this, this is the 1803
 18 Addington's Act. Then we need to go on to tab 5. One
 19 notices here "schedule (D)", one sees the opening words:
 20 "Upon the annual Profits or Gains, arising or
 21 accruing to any person or persons residing in Great
 22 Britain, from any kind of property whatever, whether
 23 situated in Great Britain or elsewhere."
 24 So those are the words that were carried on right up
 25 until 2007, and we now have, as we've seen in

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1 section 874, a reference simply to "arising".
 2 You'll see if you look at the fourth heading just
 3 towards the end of the page, about five or six lines up,
 4 it says:
 5 "In estimating the amount of the profits and gains
 6 arising as aforesaid, no deduction shall be made on
 7 account of any annual interest, or any annuity,
 8 allowance or stipend, payable out of such profits or
 9 gains, except the interest of debts due to foreigners
 10 not resident in Great Britain."
 11 Behind tab 5 it the deduction at source provision.
 12 So this was a deduction at source provision introduced
 13 in 1803 when interest simpliciter wasn't charged as tax
 14 at all, that was brought in subsequently, but it's
 15 section 208 in Roman numerals on the left-hand side of
 16 the page:
 17 "It had been further enacted that upon all
 18 annuities, yearly interest of money, or other annual
 19 payments, whether such payments shall be payable within
 20 or out of Great Britain..."
 21 Et cetera, et cetera, et cetera.
 22 If I pause there go and on to the deduction
 23 provision subsequently, as has been held in all the
 24 subsequent authorities, applying the ejustdem generis
 25 rule of construction, it is plain that yearly interest

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1 is intended to be another example of an annual payment.
 2 So that emphasises the point I made at the outset of
 3 these propositions, that yearly interest is
 4 year-by-year, annual, or whatever, it's the kind of
 5 fairly permanent thing to which a deduction at source
 6 provision is intended to apply.
 7 Then it goes on to say:
 8 "Either as a charge ...(Reading to the words)...
 9 according to and under subject of the provisions by
 10 which the duty of schedule D may be charged, provided
 11 that in every case where the same shall be payable by
 12 any person or persons out of any profits and gains
 13 charged by virtue of this act, no assessment shall be
 14 made upon such annuity, interest or other annual
 15 payment, but the whole duty due in respect of such
 16 profits or gains shall be charged without regard to such
 17 annual payment and the ...(Reading to the words)... have
 18 been due and payable."
 19 So there one can see at the outset it's assimilated
 20 to annuities and annual payments, and they are animals
 21 that have growing income day-by-day, payable
 22 periodically. One can see that the kind of interest
 23 that is regarded as yearly interest as opposed to such
 24 interest is the same kind of animal.
 25 I'll go to Bebb v Bunny in a moment if I might

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1 because I think that's quite important, and likewise the
 2 decision in Gateshead. But there isn't a case in the
 3 books in which it has been held that yearly interest
 4 applies to a situation where the interest does not
 5 accrue.
 6 LORD JUSTICE DAVID RICHARDS: That depends on the analysis
 7 of Regal Hastings and the earlier case.
 8 MR GARDINER: My Lord, yes, and it goes back to that, and
 9 I mean that may be the territory of argument, for the
 10 reasons I gave I say that that is a situation where
 11 interest accrues.
 12 LORD JUSTICE DAVID RICHARDS: Yes. I mean, I think your
 13 observation is true, isn't it, of the rest of the cases,
 14 they are all cases of loans or sums remaining
 15 outstanding and so on.
 16 MR GARDINER: That's right, my Lord.
 17 We say, following on from that, it's an essential
 18 constituent of the concept of yearly interest, it's the
 19 quality that that type of interest has and to which
 20 a deduction at source procedure applies. The deduction
 21 at source procedure is important, because -- and that's
 22 why in 1969 it was only adopted in relation to yearly
 23 interest, because that is the kind of thing that goes on
 24 and continues and would require somebody to make
 25 deductions from time to time, make returns to the

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1 Revenue, keep all the documentation and all the
 2 procedures, et cetera, that would have an effect on the
 3 recipient's tax position.
 4 That's the point which we made in I think
 5 paragraph 17 of our skeleton. May I just briefly go to
 6 that. It's picked up, I think, in our appendix as well.
 7 I mean, all the paragraphs under the heading "The
 8 nature of yearly interest" go to what we say are the
 9 constituents, are the authorities, that establish this
 10 particular meaning.
 11 So we start with saying:
 12 "The notion of 'yearly interest' has existed from
 13 the beginnings of income tax ... Addington's Act ..."
 14 Which we've just looked at, so yearly interest of
 15 money or other annual payments, 208:
 16 "... is used interchangeably with the term 'annual
 17 interest'. At inception no other interest was charged
 18 and deduction of tax at source only applied to yearly
 19 (annual) interest. This plainly recognised that such
 20 interest arose only on debts of some ongoing permanence
 21 or significance on which interest payments were likely
 22 to arise from time to time, as opposed to 'one-off'
 23 situations, and to which a deduction of tax procedure
 24 was appropriate (see the appendix to this skeleton at
 25 [5] to [9]."

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1 I'm sure you would have read all that, but if
 2 I could just very briefly mention the more significant
 3 points. Paragraph 3 is something I've already dealt
 4 with, which is Addington's Income. Paragraph 3 of the
 5 appendix, Addington's Income Tax Act of 1803. It's
 6 paragraph 5 that we say is really the clue to the
 7 meaning and the historic approach. So we say:
 8 "Thus at inception the deduction of tax at source in
 9 respect of interest only applied yearly interest. It
 10 must have been the rationale that such deduction
 11 procedures were only intended for on-going, continuing
 12 situations of some permanence and significance (such as
 13 yearly interest and other annual payments)."
 14 Then I say:
 15 "Note the reference to 'payable half-yearly or at
 16 any shorter or more distant periods' and the fact that
 17 it is regarded as an annual payment. Non-yearly
 18 interest was not generally charged to tax."
 19 There is we say a very telling point which we set
 20 out in paragraphs 10 to 13 of that appendix, and that is
 21 this, that from 1864 to 1923 yearly interest was taxed
 22 by reference to the tax rates during the period in which
 23 the interest accrued. There was no other alternative.
 24 If you had yearly interest you were taxed by reference
 25 to the rates during which the interest accrued. You see

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1 that's in paragraph 10 of our appendix the words that
 2 are underlined "during the Period through which the same
 3 was accruing due". That must presuppose that accrual of
 4 interest is an essential ingredient of yearly interest.
 5 Whatever Parliament does (inaudible) tax it doesn't make
 6 a mess of imposing the tax and the charge and the rate.
 7 The only rate applicable to yearly interest was the rate
 8 during the years of accrual.
 9 LADY JUSTICE GLOSTER: Is that the position today?
 10 MR GARDINER: No, my Lady, I'm sorry, that's the period from
 11 1864 to 1923.
 12 You see we make that point, so it's for 63 years --
 13 this paragraph 12 --
 14 LORD JUSTICE DAVID RICHARDS: Paragraph 12 of the?
 15 MR GARDINER: Of the appendix.
 16 LORD JUSTICE DAVID RICHARDS: Yes.
 17 MR GARDINER: I mean this point is dealt with in
 18 paragraphs 10 to paragraph 12.
 19 So for 63 years the only rate that could be applied
 20 to yearly interest was the rate during the period of
 21 accrual.
 22 LORD JUSTICE DAVID RICHARDS: But what are we to read into
 23 the fact that it was repealed in 1923 and hasn't been
 24 present in the tax legislation for nearly 100 years
 25 since then?

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1 MR GARDINER: My Lord, simply this - we're still concerned
 2 with the terminology "yearly interest". It's the same
 3 terminology that we have in section 874 now, that we had
 4 in 1803, and the question is has the concept of yearly
 5 interest in a deduction of tax at source procedure, has
 6 that concept and that meaning changed? And, if so, for
 7 what reason? Is there an indication in the legislation
 8 that Parliament intended to change what had become the
 9 accepted meaning of the concept of "yearly interest",
 10 for the reasons which I gave.
 11 LORD JUSTICE DAVID RICHARDS: Right.
 12 MR GARDINER: I mean, manifestly during that period --
 13 I mean the interest here couldn't have been treated as
 14 yearly interest.
 15 If I could also draw you to -- we haven't actually
 16 looked at it yet but there is the case of *Bebb v Bunny*,
 17 as my Lady said this morning, yes, that case isn't
 18 binding on this court but it has been there from 1853,
 19 it's never been doubted, in my respectful submission.
 20 It is a decision of the then Vice Chancellor Sir William
 21 Page Wood, subsequently the Lord Chancellor,
 22 Lord Hatherley. And it is definitional, it is the only
 23 case actually which perhaps is, in terminology at least,
 24 definitional of what constitutes "yearly interest".
 25 If we could actually just perhaps look at that.

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1 It's tab 1 --
 2 LORD JUSTICE DAVID RICHARDS: He spoke with some prescience,
 3 did he not, when he said "the language of which
 4 sections, from their vagueness, creates some
 5 difficulty".
 6 MR GARDINER: I'm not sure he had this case in mind, though,
 7 this far ahead.
 8 LORD JUSTICE DAVID RICHARDS: No, I am sure, but he spoke
 9 the truth.
 10 MR GARDINER: Yes.
 11 It's a fairly short and fairly succinct judgment,
 12 but the skeleton drafted by my learned friend Mr Goye
 13 says that this isn't a definitional sort of statement of
 14 what constitutes yearly interest, and my learned friend
 15 Mr Gammie hasn't actually dealt with it; but at least
 16 the headnote writer thought it was the definitional, if
 17 you actually look at the headnote it says:
 18 "A purchaser liable to pay interest on his
 19 purchase-money..."
 20 Et cetera.
 21 Four lines down:
 22 "The tax is not deducted on payment of
 23 purchase-money into Court; but the purchaser, it seems,
 24 may apply to have it deducted when the purchase-money is
 25 paid out of Court."

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1 Then it says, and this is the headnote:
 2 "The words 'yearly interest' in s. 40 of [and that's
 3 the 1853 Act] ... mean, not only interest accruing de
 4 anno in annum, but any interest at a fixed rate per cent
 5 per annum, though accruing de die in diem."
 6 LADY JUSTICE GLOSTER: I don't think that helps you, I think
 7 that helps Mr Gammie.
 8 MR GARDINER: Well, in what way, my Lady? In what way does
 9 it help my learned friend?
 10 LADY JUSTICE GLOSTER: Well, it could be said -- and I'm not
 11 saying that this my view -- that anything which is any
 12 interest -- just looking at the headnote -- at a fixed
 13 rate per cent per annum, though accruing day-to-day.
 14 Okay, you say there's no accrual here, but apart from
 15 that it's fairly widely stated, isn't it?
 16 MR GARDINER: Well, it's widely stated, but with respect
 17 I don't think it helps him because it's actually saying
 18 it's part of the definition accruing day-by-day and
 19 that's our case, this doesn't accrue day-by-day.
 20 If I just go to the relevant passage, it's actually
 21 a very short judgment it's over the page, page 437, from
 22 the top of the page:
 23 "Most mortgage deeds contain only a covenant to pay
 24 the principal, with interest at a certain rate per
 25 annum, on a day certain. After that it accrues de die

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1 in diem, and the interest, without any particular
 2 reservation, ordinarily is received half-yearly from
 3 year to year. It is difficult to see the distinction
 4 between interest so reserved and paid, and that which by
 5 special agreement accrues on purchase-money, which also
 6 goes on from day to day, and may run on for a year, or
 7 stop at any time on payment of the purchase-money, and
 8 which, in some shape or other, forms a lien on the
 9 property."
 10 Again, it's looking at a continuance of the growth
 11 of interest of the species applicable, and --
 12 LADY JUSTICE GLOSTER: But once the surplus has been
 13 ascertained here, on Day 10, why could it not be said
 14 against you that the interest is accruing as from that
 15 date?
 16 MR GARDINER: The --
 17 LADY JUSTICE GLOSTER: I can see your argument that
 18 previously, before there's any identification or
 19 knowledge there's going to be a surplus, but once it's
 20 determined at X why, from that moment going forward,
 21 isn't there an obligation and an accruing from day to
 22 day and year to year?
 23 MR GARDINER: With respect, my Lady, no.
 24 LADY JUSTICE GLOSTER: Why?
 25 MR GARDINER: Because as at the determination of the surplus

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<p>1 an obligation arises to pay a sum of money. There isn't 2 any interest thereafter accruing on that obligation to 3 pay that sum of money. What we're arguing about in this 4 case is the interest of the principal -- 5 LADY JUSTICE GLOSTER: But doesn't it go until payment, or 6 is it just until the date of determination of the 7 surplus? 8 MR GARDINER: As I understand it -- 9 LORD JUSTICE DAVID RICHARDS: If we look at the terms of the 10 rule it's reasonably clear, I think, what is involved. 11 So it's -- the trigger for the payment of interest is 12 the payment of the debts proved, not actually the 13 identification that after payment there will be 14 a surplus. 15 I mean, of course you may have some debts, you may 16 provide, of course, for disputed claims and so on. Then 17 the interest lasts from the periods during which those 18 debts have been outstanding, i.e. from the commencement 19 of the administration, to the date or dates on which 20 dividends were paid on the debts. 21 MR GARDINER: My Lord, yes. 22 LORD JUSTICE DAVID RICHARDS: That's the structure. 23 MR GARDINER: My Lord, yes. 24 In answer to my Lady, I mean that was what I was 25 trying to say, but your Lordship has expressed it much</p> <p style="text-align: center;">Page 145</p>	<p>1 "But I think it's susceptible of this view..." 2 So he's talking about yearly interest and what it 3 actually means: 4 "... that it is interest reserved, at a given 5 rate per cent per annum..." 6 Then he says: 7 "... or, at least, in the construction of this Act, 8 I must hold that any interest which may be or become 9 payable de anno in annum, though accruing de die in 10 diem, is within the 40th section." 11 The 40th section is the deduction at source 12 procedure that we're basically concerned. 13 So he is talking about "in the construction of this 14 Act", so he is looking at it in definitional: 15 "I must hold that any interest which may be or 16 become payable de anno in annum..." 17 My learned friend Mr Goye's skeleton, whenever it 18 comes across this case, they are always happy to 19 underline the words "payable de anno in annum", but they 20 never underline "accruing de die in diem", and it is 21 part of the definition. 22 LADY JUSTICE GLOSTER: Right. Well, I think we'll have to 23 continue tomorrow. 24 Not before 10.30 tomorrow. 25 MR GARDINER: I'm grateful.</p> <p style="text-align: center;">Page 147</p>
<p>1 more succinctly than I. So that the surplus is 2 determined -- 3 LADY JUSTICE GLOSTER: After payment of the debts. 4 MR GARDINER: Yes. And it's for the period -- 5 LADY JUSTICE GLOSTER: Prior to payment. 6 MR GARDINER: -- from the commencement -- yes -- to the date 7 of payment of the dividend. 8 So there isn't any interest accruing after the 9 determination of the surplus, it's simply a calculation 10 for the past. 11 LADY JUSTICE GLOSTER: Yes. So no interest on interest 12 during the period -- 13 MR GARDINER: My Lady, that's right. 14 LADY JUSTICE GLOSTER: -- which we're all arguing about this 15 point. 16 MR GARDINER: What we say is the definitional part -- I mean 17 it has been sidelined in <i>Bebb v Bunny</i> -- but the 18 definitional part is the paragraph he begins just about 19 the middle of the page where he starts the paragraph 20 saying: 21 "The whole difficulty is in the expression 'yearly' 22 interest of money." 23 So he is the first judge, in 1853 at least, tackling 24 what is yearly interest. 25 He says:</p> <p style="text-align: center;">Page 146</p>	<p>1 (4.10 pm) 2 (The court adjourned until 3 Wednesday, 1 November 2017 at 10.30 am) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 148</p>

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