

<p>1 Wednesday, 1 November 2017 2 (11.00 am) 3 Opening submissions by MR GARDINER (continued) 4 LADY JUSTICE GLOSTER: Yes, Mr Gardiner? 5 MR GARDINER: My Lady, just prior to the adjournment last 6 evening I had been dealing with the case of Bebb v Bunny 7 which I said was definitional. That is what 8 the headnote says. Sir William Page Wood was giving us 9 a definition of what constitutes yearly interest. 10 Within that definition is the requirement for interest 11 to accrue de die in diem and that is part of his 12 definition. 13 In my respectful submission on the passages that 14 I referred you to, that is clear beyond peradventure. 15 LADY JUSTICE GLOSTER: When you say accrue, do you mean 16 accruing at the time as opposed to being calculated 17 retrospectively by reference to day by day or per annum? 18 MR GARDINER: My Lady, absolutely, yes. You have put your 19 finger on it entirely. We say here the retrospective 20 calculation to give rise to an obligation to pay an 21 amount of interest in respect of the past does not 22 constitute -- 23 LADY JUSTICE GLOSTER: It is not the same as the fruit 24 growing during the actual period? 25 MR GARDINER: That is absolutely right. This is</p> <p style="text-align: center;">Page 1</p>	<p>1 a case on yearly interest, that is where to start, his 2 definition. 3 All the cases do proceed on the basis that you have 4 that kind of concept, that you have a principal amount 5 that is earning, because of that principal amount, 6 day-by-day interest which is growing day by day and 7 it is the cost to the person who has the benefit of that 8 principal. He is paying for that day by day in the form 9 of that accrued interest. So each day he has 10 the principal -- let's call it 100 -- he is effectively 11 paying a pretty minuscule amount day by day for having 12 the benefit and the privilege of using that principal. 13 As I say, you won't find anywhere in 14 the authorities, with the greatest respect, anybody 15 saying that the test for yearly interest is simply to 16 look at a period of a year. None of the authorities say 17 that; they say quite the contrary and I will come back 18 to that. 19 LORD JUSTICE PATTEN: I know your argument to some extent 20 attaches to the use of the word "yearly" but the point 21 that you have just made really goes to almost any form 22 of interest that would be within what was scheduled in 23 (3), wouldn't it? 24 MR GARDINER: No, my Lord. It comes back to the point that 25 I probably didn't answer your Lordship very well about</p> <p style="text-align: center;">Page 3</p>
<p>1 a fundamental thing in tax law. One always comes back 2 to the fruit and tree in the sense that tax law is 3 always looking at a source of income and it is taxing 4 the fruit, the income from that source. 5 Therefore the whole basis of Sir William Page Wood's 6 judgment there was to say that you have to find 7 a principal amount under a loan or investment or 8 whatever on which this interest is the flowing fruit. 9 Or, as far as the person who owns it is concerned, it is 10 the money he gets for having put out his capital 11 investment, as being the consideration and the fruit for 12 being deprived of it for the advantage of the person who 13 day by day has the use of it. 14 LORD JUSTICE DAVID RICHARDS: So it has to be a payment in 15 the nature of the income and you say that for that 16 purpose it has to accrue over the relevant period 17 prospectively, so to speak, and not simply 18 retrospectively? 19 MR GARDINER: My Lord, yes, and it may be that that is 20 the key to this case. I do not run away from it. 21 What I do say is that all the authorities that have 22 been dealing with yearly interest -- I will come on to 23 Barlow and Regal Hastings in a moment -- in my 24 submission have started by adopting the same approach as 25 Sir William Page Wood in Bebb v Bunny. If you have</p> <p style="text-align: center;">Page 2</p>	<p>1 yesterday. It is this distinction that if you have 2 yearly interest, it is looking at an ongoing form of 3 investment, something that is giving rise to 4 the interest year by year. 5 LORD JUSTICE PATTEN: I know, but it's got to be in the 6 nature of income. 7 MR GARDINER: Of course. 8 LORD JUSTICE PATTEN: So the statute contemplates that all 9 forms of interest on the basis that they're taxable fall 10 within that definition, i.e. that they're in the nature 11 of income. 12 MR GARDINER: My Lord, yes. 13 LORD JUSTICE PATTEN: What I think -- I mean, tell me if I'm 14 wrong -- but what I think you are submitting on the 15 basis of Bebb v Bunny and the other cases is that the 16 recurring nature of an interest payment makes it or is 17 an essential part of it being an income payment, isn't 18 it? 19 MR GARDINER: I am saying it's an essential part of 20 constituting yearly interest that you have an instrument 21 which has some kind of permanence giving rise to the 22 earning of interest over a period of time on that 23 interest. 24 LORD JUSTICE PATTEN: Then on what basis is any other form 25 of interest taxable?</p> <p style="text-align: center;">Page 4</p>

1 MR GARDINER: Any other form of interest is taxable because
 2 it constitutes interest, and interest per se is
 3 an income item. So if the statute -- I mean, if we look
 4 at *Riches v Westminster Bank*, we can come back to it,
 5 the passage my learned friend raised, counsel Mr Donovan
 6 as he then was, who was a tax lawyer, said, "Look this
 7 is income, this is interest, because the statute says
 8 it's interest. If a statute tells you that something is
 9 interest, then within our schedule and system of tax in
 10 old terminology schedule D case 3, taxed all interest of
 11 money.
 12 LORD JUSTICE PATTEN: Yes, but if that was right, you
 13 wouldn't need the accrual point because it would be
 14 taxable simply by virtue of the fact that it was
 15 interest regardless of whether it was yearly or
 16 otherwise, including yearly interest.
 17 MR GARDINER: My Lord, that's right, but you need the
 18 accruals point because there is clearly a distinction in
 19 the legislation between yearly interest and other forms
 20 of interest. That's the point I was making yesterday;
 21 you can see that yearly interest, for example, all that
 22 63-odd years was taxed by reference to the rate at which
 23 it accrues, whereas ordinary interest, non-yearly
 24 interest, was taxed by reference to the tax rate on when
 25 it was paid.

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1 So the legislation has always recognised -- I mean,
 2 it goes right the way back. Lord Justice Lindley in
 3 *Goslings* makes the point initially that there are two
 4 types of interest recognised in the legislation and this
 5 is still true today. There's yearly interest and other
 6 forms of interest. What we are looking for is the
 7 discrimen as to what are the constituents which make
 8 something yearly interest as opposed to just interest.
 9 LORD DAVID RICHARDS: Like Lord Justice Patten, if I read
 10 the transcript of the opening minutes of your
 11 submissions this morning, they would I think be equally
 12 applicable to non-yearly interest as to yearly interest.
 13 So I'm having difficulty in understanding the emphasis
 14 you are placing on the word "yearly" here because you
 15 did start with a general proposition about the nature of
 16 income tax, and for interest to be income it must accrue
 17 prospectively over a period. But why is that not true
 18 of any interest?
 19 MR GARDINER: Because it's the conjunction, my Lord, of --
 20 LORD DAVID RICHARDS: If it was monthly interest --
 21 supposing there was something said to be monthly
 22 interest, it would be a different regime, would it?
 23 MR GARDINER: I'm sorry, my Lord, I interrupted
 24 your Lordship.
 25 LORD DAVID RICHARDS: No, I interrupted you. I am just

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1 trying to understand this: maybe you say if the statute
 2 referred to monthly interest, well, that would be
 3 different too, that would be like yearly interest. Is
 4 that right?
 5 MR GARDINER: That would be a periodic payment of interest
 6 in respect of an instrument. But the important thing is
 7 that they are looking for something of some kind of
 8 permanence. That's why you've got a deduction of tax at
 9 source. Again, if one goes back, you've got yearly
 10 interest and it's payable monthly or it's payable
 11 quarterly, half-yearly or yearly. You've then got these
 12 certificates of deduction at source which have got to be
 13 given, you've got a formal ongoing procedure. That's
 14 what it's all about.
 15 LORD DAVID RICHARDS: To be clear, the submissions you were
 16 making to us you say were directed only to yearly
 17 interest, not to interest taxed as income.
 18 MR GARDINER: My Lord, yes, but it's the conjunction of the
 19 accruals with an instrument. It's an instrument of some
 20 permanence was the point I was making yesterday --
 21 perhaps I didn't make it as well as I might have done, I
 22 don't know. But it's a point we come on to in a moment
 23 and it's quite revealing in this case.
 24 Mr Justice Rowlatt, who was the great tax judge in
 25 the 1920s and 1930s who decided some of the most major

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1 issues that we still have to live with, in that case of
 2 *Garston*, he says you've got to have a form of
 3 investment. It's the same thing with *Lord Sumner* in
 4 *Gateshead*. They're saying what we're looking for when
 5 you've got yearly interest is something of some kind of
 6 permanence giving rise to accruing income over time, the
 7 accruing income being the payment for the use of the
 8 principal under that instrument over time.
 9 It's a point that my Lady put to me earlier is the
 10 distinction between that form of instrument and this
 11 case.
 12 LORD DAVID RICHARDS: It's the conjunction of the instrument
 13 and?
 14 MR GARDINER: And the accruing interest being paid for the
 15 use of the principal under that instrument.
 16 LORD JUSTICE PATTEN: I mean, I think the -- I'm not saying
 17 this is duplicative of your submissions, but the
 18 difficulty with this case in terms of trying to put
 19 a definition on the phrase "yearly interest" is that in
 20 terms of the legislation, it's got to be approached
 21 I think at two levels. All forms of interest, if one
 22 goes back to D3, yearly or including yearly -- I can't
 23 remember the actual wording of the relevant part of
 24 D3 -- are taxable.
 25 MR GARDINER: Yes.

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<p>1 LORD JUSTICE PATTEN: So that suggests they are taxable not 2 by reference to whether they are annual or otherwise, 3 but by reference to the fact that they are interest. 4 MR GARDINER: Yes, my Lord. 5 LORD JUSTICE PATTEN: And so at that sort of point of entry, 6 you've got to be able to say, well, are they taxable 7 simply because so to speak they are called interest in 8 the sense that it's some form of compensation for the 9 time value of money? Simpliciter, nothing beyond that. 10 Or is there some other factor, some other characteristic 11 of the payments you have to be able to identify which 12 makes them taxable in the sense of income? 13 Therefore, one gets all these cases -- Benarto is an 14 example but there are others -- where the real argument 15 was whether it was capital or income, and that argument 16 is conducted simply by reference to whether the payments 17 are taxable. Then the legislation lifts out of that 18 class of taxable payments interest of all kinds, yearly 19 interest for two specific purposes, as I see it, and 20 this is in very broad terms. One is the deduction of 21 tax for, if you like, administrative and other 22 convenience of the Revenue which is really what we're 23 concerned with, but under some of the statutes because 24 it entitles the payer to retain the tax and it gives the 25 payer a corresponding benefit where the payments are</p> <p style="text-align: center;">Page 9</p>	<p>1 preferred position is that you only get to that question 2 in terms of whether it's yearly interest, and I query 3 that. That's all. 4 MR GARDINER: My Lord, there are a lot of points there -- 5 LORD JUSTICE PATTEN: I know there are. 6 MR GARDINER: -- and I'm not sure I'm going to answer all 7 them all in my response. But if I could say this: if 8 you've got interest of any kind, it is taxable as 9 income. 10 LORD JUSTICE PATTEN: Yes. 11 MR GARDINER: The next question therefore is: have you 12 actually got yearly interest and what distinguishes 13 yearly interest from any other forms of interest? Now, 14 I say that all the cases -- I mean, to be fair to the 15 learned judge below, he deals with this and perhaps 16 we'll come to that later. But to be fair to the judge 17 below, he accepted our submissions on this; that what 18 you need to look at is do you have an investment, 19 something of that nature, on an ongoing basis which is 20 likely to give rise to interest being earned for the use 21 of the principal under that investment over time? Now 22 that in a nutshell we say would give rise to yearly 23 interest and that categorised yearly interest as opposed 24 to non-yearly interest. 25 As far as non-yearly interest is concerned, I accept</p> <p style="text-align: center;">Page 11</p>
<p>1 being made out of taxed income, and so on, which is 2 a different thing. But -- and it doesn't really matter 3 other than to recognise that it's in -- there may be 4 others, I don't know, but those seem to me the most 5 specific examples of where Parliament has accorded 6 special treatment for yearly interest, neither of which 7 require one to form a view about whether it's taxable. 8 It's all assumed to be taxable because otherwise you 9 don't get to the second stage of should it be deducted, 10 should it be retained. 11 I mean, those are all on the premise that we're 12 dealing with taxable payments. So it might be said, 13 therefore, that there wasn't -- that in deciding -- 14 although it's true that yearly is accorded that 15 particular treatment, the nature of interest of all 16 kinds being taxable is a sort of prior consideration 17 which has to apply across the board. So this question 18 of accruals and recurrence, and so on, if it's 19 an important feature of them being taxable payments, is 20 a consideration for the first stage, not for the second 21 stage. That's what I am concerned, I think, to bottom 22 out. That's why as my Lord put it to you, 23 Mr Gardiner -- you started this morning I think in 24 yourself by treating it as part of the question of 25 whether the income is taxable, but I think in fact your</p> <p style="text-align: center;">Page 10</p>	<p>1 there might be non-yearly interest, whereby the interest 2 accrues. You might have interest for six days, Goslings 3 is that kind of case, and it accrues over those six 4 days. But also you might have interest that doesn't 5 accrue at all, it's a one-off calculation in respect of 6 the past, which is this case. We say when you actually 7 look at this historically, there is clearly 8 an assumption by the legislature that yearly interest 9 always accrues. Per contra, interest which is 10 non-yearly, implicitly at least, does not have to accrue 11 because it is not taxed at a rate by reference to 12 accruals but only at the rate on the day on which it is 13 paid. 14 And that contrast, in my respectful submission, does 15 illustrate the importance of the accruals concept on 16 a principal investment or whatever for yearly interest 17 contrasted with a category of non-yearly interest which 18 may not accrue, and therefore the rate of tax applicable 19 to it always was regarded as the rate on the date of 20 payment. 21 Because if all the interest -- it's a point 22 your Lordship put to me yesterday -- if all interest 23 accrues, then why on earth didn't they actually have 24 a provision for all interest yearly or non-yearly to be 25 taxed by reference to the date of accrual? They didn't</p> <p style="text-align: center;">Page 12</p>

1 because they recognised that non-yearly interest does
 2 not necessarily accrue.
 3 LORD JUSTICE PATTEN: I'm not really sure I know the answer
 4 to that question of why they picked yearly interest,
 5 even on your understanding. I mean, if for example you
 6 have what is genuinely monthly rather than yearly
 7 interest, it seems to me that it might be said if you
 8 were starting from scratch, where that was ongoing
 9 possibly for a not inconsiderable period of time, there
 10 was a case to be made for a deduction at source.
 11 MR GARDINER: Well, all I can say, my Lord, to that is that
 12 at the outset in 1803 -- and I know that after 83-odd
 13 years they brought in a different deduction procedure
 14 for some non-yearly interest but we don't have that now,
 15 we only have a deduction procedure for yearly interest.
 16 But the original idea, I would submit, was that yearly
 17 interest, as the judges said at the time, was a like
 18 animal to annuities and annual payments. And if we
 19 think about annuities and annual payments, an annuity is
 20 something you get paid usually once a year, but perhaps
 21 half-yearly or quarterly or whatever, but it is accruing
 22 over a period, likewise an annual payment.
 23 It has the like characteristics, and that is the
 24 conjunction of those words that I showed you in the 1803
 25 Act yesterday. Indeed, as is said in *Bebb v Bunny*, and

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1 Sir William Page Wood made the point, and likewise in
 2 *Goslings* -- and in fact in all the other cases -- they
 3 say it's assimilated to annual payments.
 4 LADY JUSTICE GLOSTER: Can I just be clear. What does
 5 "yearly" connote? It doesn't, as I understand your
 6 submission, connote that interest has to be paid once
 7 a year. It will usually be by reference to an annual
 8 rate, but it doesn't need to be because it could be
 9 a monthly rate that changed. There doesn't have to be
 10 an obligation that the loan or investment has to be
 11 outstanding for a minimum of a year.
 12 MR GARDINER: The last proposition, I'm not so sure I would
 13 necessarily agree with that.
 14 LADY JUSTICE GLOSTER: I think I need to know the answer to
 15 that. I mean, is it -- okay, you can pull an investment
 16 at any time unless there are specific terms -- well,
 17 maybe you can't, but let's assume an investment which
 18 you can ask the investee to repay, are you saying if you
 19 have some sort of note that if it can be redeemed within
 20 the year it won't be annual interest?
 21 MR GARDINER: If you have a note that is a fixed term note
 22 for three months or six months with a bullet payment,
 23 for example, after the six months --
 24 LADY JUSTICE GLOSTER: That's not yearly.
 25 MR GARDINER: -- that's not yearly interest, yes.

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1 LADY JUSTICE GLOSTER: So in most cases, the obligation to
 2 leave the money in, as it were, will span over a year.
 3 MR GARDINER: Yes. What the judges say is: is it something
 4 which is capable of extending over a year? If you can't
 5 tell for certain that it's over a year, but is it
 6 capable of extending over a year? That was the point
 7 Sir William Page Wood made in *Bebb v Bunny*: if it is,
 8 then you can treat it as being yearly interest. If
 9 however it was a fixed term note, three months, six
 10 months --
 11 LADY JUSTICE GLOSTER: Overnight.
 12 MR GARDINER: -- yes, whatever -- overnight, yes, then that
 13 couldn't be yearly interest. So it's looking at the
 14 nature of the investment and it's looking at what the
 15 interest is there for as it's accruing, what it's
 16 earning. Is it earning the use of the principal on this
 17 investment over a period of time, and is that period of
 18 time capable of exceeding a year?
 19 LADY JUSTICE GLOSTER: So a bank deposit where there is no
 20 obligation to make a deposit for a year would not be
 21 yearly interest.
 22 MR GARDINER: My Lady, yes, that's right. And that's
 23 actually very revealing and it comes back to a point my
 24 learned friend made yesterday. He said that if you have
 25 a bank deposit which extends over a year, it might even

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1 go on for two years or three years, that's not yearly
 2 interest because it's not in the form of an investment,
 3 and he referred to the case of *Garston*, which is
 4 a decision of Mr Justice Rowlatt.
 5 Now that actually is part of our submissions, that
 6 was part of our case before the judge. The judge
 7 adopted that and I will show you the passage later, but
 8 it might be worthwhile if I showed you what my learned
 9 friend said about this yesterday. Paragraph 2 of their
 10 skeleton says the only discrimen between interest and
 11 yearly interest is a period of calculation of a year,
 12 basically. Now yesterday, he was saying you might have
 13 a bank deposit that goes on for well over a year which
 14 seems to fall within paragraph 2 of their skeleton, the
 15 discrimen between yearly interest and interest. But he
 16 says because it's not in the nature of an investment,
 17 it's not therefore regarded as yearly interest. Well,
 18 that proposition that he made yesterday is accepting our
 19 case.
 20 Then as I'll come on to show you when I look at the
 21 judgment, that's part of what the judge held in this
 22 case. One is in a somewhat difficult position in this
 23 case in the sense that the skeleton is saying the only
 24 test is twelve months. If you have a calculation period
 25 of more than twelve months, yearly interest. But then

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1 he said yesterday if you have this type of thing which
 2 gives rise to interest over twelve months for the twelve
 3 months, that's not yearly interest.
 4 We've produced copies of the transcript yesterday.
 5 I don't know whether you actually have printed copies,
 6 so it might be worthwhile showing you that little
 7 passage.
 8 LADY JUSTICE GLOSTER: Very well.
 9 MR GARDINER: It's yesterday's transcript which -- yes,
 10 could we hand it in?
 11 LADY JUSTICE GLOSTER: We have copies.
 12 MR GARDINER: I am grateful. It's yesterday's transcript
 13 and it is pages 30 to 32. It's page 30 starting at line
 14 20, going through page 31 and ending on page 32 at line
 15 18.
 16 LORD JUSTICE PATTEN: 30 we start, do we?
 17 MR GARDINER: Page 30, my Lord, at line 20. It's a question
 18 for my Lady and then goes through page 31 and then going
 19 through page 32 to line 18.
 20 (Pause)
 21 LADY JUSTICE GLOSTER: Where do you want us to highlight?
 22 MR GARDINER: When he says "yes, essentially", and then he
 23 says at the top of page 31:
 24 "... the money at your bank on an ordinary deposit
 25 account and it remains outstanding for more than a year,

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1 it's not generally regarded as yearly interest..."
 2 That is contrary to paragraph 2 of their skeleton
 3 which says if you have a period of calculation of more
 4 than a year, that is the test. Then he makes the
 5 reference to Mr Justice Rowlatt in Garston and that's
 6 between lines 20 and --
 7 LORD JUSTICE PATTEN: I mean, what Mr Gammie keeps -- the
 8 point he is making in answer to all these questions he
 9 is being asked is it seems to be a question of intention
 10 at the time presumably of the deposit.
 11 MR GARDINER: All one can is if you look at Garston --
 12 perhaps we can look at it in a moment -- it's clearly
 13 Mr Justice Rowlatt saying it's got to be an investment
 14 intended to be there, giving rise to accruing interest.
 15 LORD JUSTICE PATTEN: Yes.
 16 MR GARDINER: I mean, that is the rationale for it.
 17 LORD JUSTICE PATTEN: You say it's not just a question of
 18 asking yourself retrospectively or with the benefit of
 19 hindsight how long has it lasted, you have to look at
 20 what was intended to be the nature of the deposit
 21 ab initio.
 22 MR GARDINER: My Lord, yes. Was it intended to be
 23 an investment over a period of time so as to attract
 24 yearly interest? That's exactly the same as the ratio
 25 of the decision in Gateshead, which I need to come to in

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1 a moment. That is the whole point in it. I mean, one
 2 is in the rather difficult position in this case; in the
 3 one moment in the grounds of appeal and in their
 4 skeleton argument they are saying it's simply a question
 5 of calculation, but then there he is yesterday conceding
 6 that it isn't just a question of calculation because you
 7 have a period where it's running over twelve months. As
 8 indeed in Gateshead, you've got it running on for years
 9 and years and years.
 10 As we say, that's clear authority against that
 11 particular proposition. There isn't an answer in
 12 support of their grounds of appeal in their skeleton
 13 argument to come forward and say in effect that they're
 14 adopting our argument. That's what it amounts to, in my
 15 respectful submission.
 16 Perhaps I have run away with myself or your Lordship
 17 has got me to run away with myself.
 18 LADY JUSTICE GLOSTER: Why don't you get back to the course.
 19 MR GARDINER: Yes. The next point I wanted to make really
 20 was in relation to the two cases which we touched on
 21 yesterday. I think we only touched on them and
 22 I actually would like to look at them again, the two
 23 cases Barlow and Regal Hastings, which I think from the
 24 exchanges, obviously all members of the court were
 25 interested in.

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1 I don't accept those cases decided that you can have
 2 yearly interest without the accrual I have been talking
 3 about. If they so decided, in my respectful
 4 submission --
 5 LORD DAVID RICHARDS: Sorry, your submission is they did not
 6 decide that you can have yearly interest without accrual
 7 during the relevant period?
 8 MR GARDINER: My Lord, yes.
 9 LADY JUSTICE GLOSTER: Without actual accrual?
 10 MR GARDINER: Yes, my Lady yes.
 11 If it says that's what they were decided, then they
 12 were wrongly decided. But I don't think that's what
 13 they did decide and that's why I just need to look at
 14 them briefly again.
 15 Barlow was a decision of Mr Justice Finlay, Regal
 16 Hastings was a decision of Mr Justice Cassels. There's
 17 no great analysis in either of the cases, but in both of
 18 them -- I'll come to look at them in a moment if
 19 I might, but just to make our basic proposition -- we
 20 say there was an original principal amount owing in
 21 consequence of the breach of trust of fiduciary duty,
 22 and interest if it were payable accrued on that
 23 principal amount.
 24 LADY JUSTICE GLOSTER: In real time?
 25 MR GARDINER: Yes. Yes, my Lady.

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1 Now, I accept that there might have been the
 2 possibility of other greater payments than such interest
 3 being payable.
 4 LADY JUSTICE GLOSTER: What, because the court ordered it?
 5 MR GARDINER: Precisely, my Lady, yes.
 6 But we say that that situation is no different from
 7 a situation where, for example, you have a variable rate
 8 of interest. Some interest was accruing, whether it was
 9 a 2 per cent, 3 per cent, 4 per cent or 5 per cent, as
 10 far as I'm concerned doesn't make any difference. What
 11 is critical, in my respectful submission, is that
 12 interest was accruing on the principal.
 13 LORD DAVID RICHARDS: If you have a variable rate of
 14 interest, you'll always know at any one time the rate at
 15 which interest is accruing. So if it's LIBOR plus 2,
 16 you know what LIBOR is on any day and therefore you know
 17 what's accruing.
 18 MR GARDINER: Not necessarily, my Lord. In the ordinary
 19 case, I entirely accept that, but you might have
 20 a situation where you've got a rate of interest of
 21 2 per cent. But in certain contingent eventualities, it
 22 goes up to 2.5 per cent or 3 per cent, something of that
 23 nature.
 24 What we say is actually very important: if interest
 25 is paid -- and interest we say accrues in those

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1 circumstances even though it might be adjusted, might
 2 whatever, but interest is accruing -- but that interest
 3 is paid on the principal and the only source of that
 4 interest is the principal. It's the money paid to earn
 5 the use of that principal for the period. So the only
 6 source of the interest is the principal on which the
 7 interest accrues, the principal being outstanding
 8 through that period.
 9 One then needs to contrast that type of situation to
 10 the situation here where the source of the interest is
 11 not the principal, it's the ascertainment of a surplus
 12 after the principal has been repaid.
 13 So it's a point coming back to the answer I gave to
 14 my Lady's first question this morning: here you do not
 15 have accruing interest being paid for the use of the
 16 principal outstanding at the time the interest is being
 17 payable for the use of that principal. You've got
 18 a retrospective calculation after the principal has been
 19 repaid and the interest is not accruing for the use of
 20 that principal during the time that is available to the
 21 borrower and away from the lender.
 22 LORD DAVID RICHARDS: Can I -- I'm a bit confused by the use
 23 of the word "source". The only source of the interest
 24 is the principal in the typical case, and here the
 25 source of the -- I'm not quite sure I understand exactly

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1 what you mean by "source" here. Can you just help me
 2 a bit on that?
 3 MR GARDINER: My Lord, I hope it won't confuse; for tax
 4 purposes, one is always looking at a source of income.
 5 LORD DAVID RICHARDS: Yes, okay.
 6 MR GARDINER: So if you just take the position of myself.
 7 I carry on a profession, the profession I carry on is
 8 the source of the profits, I make profits from that
 9 profession. If you have interest, you are looking for
 10 the source of the interest. What is the principal?
 11 What is the instrument that gives rise to that interest?
 12 Now in the ordinary case, what we are looking at of
 13 an instrument giving rise to yearly interest, the sole
 14 source of that interest is the use of the principal over
 15 that particular time because that's what's been given to
 16 the borrower and he pays for the use of it.
 17 Here --
 18 LORD DAVID RICHARDS: I'm sorry --
 19 MR GARDINER: I'm sorry, my Lord.
 20 LORD DAVID RICHARDS: Because you used the word "instrument"
 21 a moment ago. I understand you could say the instrument
 22 is the legal source of the obligation to pay, but that's
 23 not sense in which you're using this now. I am really
 24 having -- you say the source of the interest is the use
 25 of the money by the debtor over the period, but that's

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1 an explanation of what interest is, isn't it?
 2 MR GARDINER: Well, my Lord, yes. In the ordinary case,
 3 yes. The only thing that the interest is being paid
 4 for --
 5 LORD DAVID RICHARDS: Well, in one sense, I think you are
 6 using this word in a rather sort of fluid way, if I may
 7 say so. In one sense, the source of the interest, of
 8 statutory interest, is the use of the money by the
 9 administrators over the period, you might say.
 10 I mean, I don't -- I am really struggling a little
 11 with this.
 12 MR GARDINER: My Lord, if I try to rephrase it, it might be
 13 more --
 14 LORD DAVID RICHARDS: Yes.
 15 MR GARDINER: In the ordinary case where you are looking at
 16 yearly interest, the only thing that gives rise to the
 17 yearly interest is the making of available of the
 18 principal sum under whatever instrument you have. Let's
 19 assume a simple loan, I agree to lend you 100. Because
 20 I've lent you 100 and it's available to you from day 1
 21 to day 100, interest accrues over that period of time
 22 and you pay in respect of that use for that period
 23 whatever is the interest rate.
 24 Here there isn't any interest being paid during the
 25 period of time that the principal is available. You do

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<p>1 not have any interest being paid for the use of the 2 principal during that period of time. You only ever get 3 any interest if but only if there is the creation of 4 a surplus. 5 That's what makes this different. That's what gives 6 rise to an ex post facto retrospective calculation of 7 something which the statute calls interest. 8 LADY JUSTICE GLOSTER: Why is it determinative that there is 9 an actual accruing interest in real time on money we 10 know is outstanding rather than a retrospective one 11 which assumes that the money has been outstanding that 12 time and imposes an interest obligation on it? Why does 13 that make a difference other than because you say so? 14 MR GARDINER: Simply because for the purposes of yearly 15 interest, they are looking at an instrument of some kind 16 of enduring, ongoing nature giving rise to the payments 17 of interest for the use of that principal over a period 18 of time. 19 LADY JUSTICE GLOSTER: Right. 20 MR GARDINER: It's the nature of the animal to which it was 21 thought appropriate to apply a deduction of tax at 22 source procedure. 23 LORD DAVID RICHARDS: You do often use this word 24 "instrument" but that's not -- I don't quite know what 25 you mean by instrument.</p> <p style="text-align: center;">Page 25</p>	<p>1 MR GARDINER: My Lord, yes. 2 LORD JUSTICE PATTEN: I was just looking through the report. 3 Do you know, Mr Gardiner, whether -- I mean, the 4 surcharge was chargeable as the headnote says under 5 section 24 of the 1923 Finance Act, but what were the 6 terms of the charge, do you know? I know the judge here 7 was saying was it yearly interest, but was it -- my 8 understanding is surtax was payable on all forms of 9 interest. 10 MR GARDINER: I think that's right. I know I've been in 11 this business a long time, but actually I wasn't around 12 when -- 13 LORD JUSTICE PATTEN: I appreciate that. I am only getting 14 that from Benarto that you gave us yesterday where 15 I think they set out the provisions of the statute. 16 MR GARDINER: My Lord, without further research, I don't 17 think I can answer your Lordship's question. 18 LORD JUSTICE PATTEN: Yes, okay. Perhaps somebody can give 19 us the answer in due course. 20 MR GARDINER: Yes, we'll try and do so. 21 The only points I really wish to emphasise was the 22 middle of page 359, I think. Just over a third of the 23 way down the page, there's a sentence beginning just 24 after the middle of the page, "The sale realised 25 GBP 27,720."</p> <p style="text-align: center;">Page 27</p>
<p>1 MR GARDINER: What investment I could use. 2 LORD DAVID RICHARDS: I mean, I think of the word instrument 3 as meaning a document of some sort. Actually a statute 4 could be an instrument for your purposes, but actually 5 an oral loan for two years with interest payable at 6 a certain rate on a quarterly basis would lead to yearly 7 interest, wouldn't it? 8 MR GARDINER: My Lord, I agree with that -- 9 LORD DAVID RICHARDS: So the word instrument in the normal 10 legal sense is not really part of this, is it? 11 MR GARDINER: My Lord, I think you are right, and I think 12 I would have been better off to use the terms as used in 13 the authorities. 14 LORD DAVID RICHARDS: "Investment". 15 MR GARDINER: "Investment". 16 LORD DAVID RICHARDS: It must be an investment. 17 MR GARDINER: Yes. 18 Could I then just look at those two cases, because 19 I did apprehend yesterday that you were all quite 20 interested in them. The first one is Barlow and the 21 second one is Regal Hastings. 22 LADY JUSTICE GLOSTER: Barlow is at tab 12? 23 MR GARDINER: Tab 12, my Lady, yes. It's Mr Justice Finlay. 24 I think we looked at the headnote, but I think -- 25 LORD JUSTICE PATTEN: This is a surtax case, isn't it?</p> <p style="text-align: center;">Page 26</p>	<p>1 That's the appellant reinvested through his brokers, 2 so he sold the investments from the trust in his own 3 name in various unauthorised securities which 4 subsequently fell in value: 5 "The defendant's co-trustees refused ... (reading to 6 the words)... breach of trust by the appellant." 7 Then we go on to the year 1930: 8 "In that year, the appellant having had his 9 attention again called to this breach of trust 10 ...(Reading to the words)... was drawn up and executed 11 on 27 March 1930, roughly seven years after the breach 12 of trust." 13 Then you can see the recital just further down the 14 page, which basically if one looks at it, is reciting 15 that "he was already obliged to repay this money with 16 interest thereon at the rate of 5 per cent and 17 per annum." 18 LORD DAVID RICHARDS: Well, the interest I think this case 19 is concerned with is not that interest, but the 20 5 per cent of the GBP 7,704. 21 MR GARDINER: My Lord, that's right. It's the next page, 22 page 360. In the middle of the page, the paragraph 23 beginning, "Now what really happened?" Eight lines 24 down: 25 "The questions raised in the appeal ...(Reading to</p> <p style="text-align: center;">Page 28</p>

1 the words)... under the head, that is the sum of
 2 GBP 7,704."
 3 Then in the next paragraph, he refers to Benarto,
 4 and he says:
 5 "Before coming to that case, it is perhaps desirable
 6 that I should just refer to an authority to which
 7 attention was called [and I referred to this yesterday].
 8 The authority is the case of Vyse v Foster ...(Reading
 9 to the words)... a well known passage."
 10 Then he reads that out. I read it to your Lordships
 11 and my Lady yesterday and I don't intend to repeat that.
 12 But that's simply a principle saying that if there is
 13 a breach of trust then, yes, there may be remedies for
 14 the profits having to be disgorged and all the rest of
 15 it. But fundamentally, as far as the breach is
 16 concerned, you've got to repay the monies lost in
 17 consequence of the breach and then you may have interest
 18 accruing in respect of that amount. And in
 19 Vyse v Foster, there is the reference to a 5 per cent
 20 charge of interest.
 21 Vyse v Foster is not really of any great relevance
 22 to us, but it shows how phenomenally successful some of
 23 these partnerships in Victorian England were. The
 24 amounts involved are astronomical for the 1880s, but
 25 there we are. That's why perhaps it's a very famous

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1 case.
 2 LORD JUSTICE PATTEN: Which one, the one we're looking at,
 3 the Barlow case?
 4 MR GARDINER: No, Vyse v Foster. It's the one I showed you
 5 yesterday, the classic statement that is very well
 6 known, as Mr Justice Finlay says, of Lord Justice James
 7 in this court.
 8 Interestingly enough, it's the last point I want to
 9 make about this, is on page 363. At the first break on
 10 that page, he says:
 11 "That leaves only the point which also the special
 12 Commissioners decided. They decided as an alternative
 13 as to whether this supposing it to be interest was not
 14 yearly interest. ...(Reading to the words)...was a
 15 correct decision."
 16 So he clearly, at least as far as that is concerned,
 17 seems to think he is following Bebb v Bunny. He's
 18 certainly not saying this is a decision which is
 19 inconsistent with Bebb v Bunny, he is saying he is
 20 following Bebb v Bunny. On that basis, he must be
 21 proceeding on the basis that this interest accrues de
 22 die indiem.
 23 That's why I respectfully say that that is my
 24 understanding of the way in which he decided the case --
 25 LORD DAVID RICHARDS: He may only be saying that it was

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1 interest paid in respect of a period longer than a year
 2 and that's why he specifically refers and to
 3 distinguishes Goslings.
 4 MR GARDINER: I'm sorry, my Lord, where does one get that
 5 from?
 6 LORD DAVID RICHARDS: He goes on to say:
 7 "A distinction was drawn very much later in the case
 8 of Goslings & Sharpe."
 9 What he is focusing on is the period, was it more or
 10 less than a year?
 11 MR GARDINER: I think he is saying two things as
 12 I understand it. He is saying, "I think I'm following
 13 Bebb v Bunny. You might have a distinction where you
 14 have for example a short period of time such as Goslings
 15 but you do not have that here. Therefore, this is
 16 a case of yearly interest".
 17 LORD JUSTICE PATTEN: Yes. But even on your analysis, these
 18 are not the same as the conventional investment cases.
 19 We had a discussion earlier on about when does
 20 an overnight deposit or a bank deposit become yearly
 21 interest, and you said relying on what Mr Gammie had
 22 said and in part and being your own submission, you had
 23 to look at the intention at the start of the investment
 24 as to whether it was intended to be long-term.
 25 Well, that's not a feature in this sort of

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1 situation. If a trustee commits the breach of trust,
 2 it's completely indeterminate at the time of the breach
 3 how long the asset will remain in his hands and what
 4 period therefore any award of interest will cover.
 5 I mean, you certainly can't determine that question as
 6 to whether it's yearly interest by reference to some
 7 test of intention.
 8 MR GARDINER: My Lord yes. I think the only point of my
 9 comments was really this in response to the reliance
 10 made on the other side: the other side are saying, as
 11 I understand it, here is a case where interest did not
 12 accrue, therefore this is a case which destroys,
 13 Mr Gardiner, your argument. And I am saying that's not
 14 so, actually, as a matter of analysis.
 15 LORD JUSTICE PATTEN: But the point I am trying to get your
 16 help on is that on the second point -- I mean, I'm
 17 puzzled about the second point because I'm not sure why
 18 it was relevant to the question of whether there should
 19 be surtax, but let's --
 20 LORD DAVID RICHARDS: I think there was a deduction
 21 available to the taxpayer.
 22 LORD JUSTICE PATTEN: Right, yes. So I see, it's
 23 a deduction point. Yes, okay. Well, on that basis, it
 24 was held to be yearly interest. It must be because --
 25 simply because the period it had covered was more than

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1 a year.
 2 MR GARDINER: Not necessarily, my Lord. I think what they
 3 would say is that they are assimilating this kind of
 4 situation to -- it's in the terms of Lord Justice James
 5 in that case of Vyse v Foster. He says -- and it's the
 6 same in Regal Hastings v Gulliver -- you've got to treat
 7 that person as having invested the money, the breach of
 8 trust money. You've got to treat him as having
 9 invested the money and giving rise to interest on it
 10 over a period of time. Therefore, by that assimilation,
 11 you get to the same concept as it is otherwise in the
 12 cases of an investment giving rise to an accruing
 13 interest over a period of time.
 14 LORD JUSTICE PATTEN: Well, I'm sorry to sort of be the dog
 15 with the bone about this, but it can't though on that
 16 analysis depend on intention, can it? Even if you are
 17 right and there has to be an accrual -- and you've
 18 explained why you say there is an accrual in these sort
 19 of cases because there is a liability, if you like, that
 20 subsists from the date of the breach -- even if that's
 21 right and there is an accrual, what determines whether
 22 it's yearly as opposed to some other form of interest
 23 has to be simply the fact that it lasts more than
 24 a year.
 25 MR GARDINER: I don't accept that, my Lord. I think the

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1 basic analysis as a matter of breach of trust is that
 2 you've got to say the trustee has to be treated as
 3 having invested the money at interest and therefore
 4 you've got the nature of a relatively long term
 5 ongoing --
 6 LORD JUSTICE PATTEN: We get that out of Vyse, do we?
 7 MR GARDINER: I think we do, my Lord, yes. It comes back to
 8 the 5 per cent interest, et cetera.
 9 Vyse is behind tab 2, it's the passage on page 7,
 10 the first paragraph at the top of page 7 behind tab 2
 11 and Lord Justice James:
 12 "If an executor or trustee makes profit by improper
 13 dealing with the assets or the trust fund, that profit
 14 he must give up to the trust. If that improper dealing
 15 consists in embarking or investing the trust money in
 16 business, he must account ...(Reading to the words)...
 17 in their own accounts with interest at 5 per cent ..."
 18 LADY JUSTICE GLOSTER: Mr Gardiner, my problem is that here
 19 in the trust beneficiary situation, the law on equity or
 20 whatever is imposing this obligation to pay interest.
 21 It's not a kind of real time accruing obligation.
 22 I mean, in one sense it is because the obligation is
 23 always there since the date of the breach, but it's
 24 imposed by the law. It's not as though it's actually
 25 you can see the fruit on the tree. The same in Benarto

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1 where there's a composite sum that's awarded at the end
 2 of the story. That's why I'm having difficulty with
 3 your submission that accrual is all you've got to see,
 4 real fruits accruing in real time. Because here the
 5 only difference it could be said against you is that
 6 it's the statute, rules, that impose the obligation
 7 after the event to pay.
 8 And that's I think where I am having difficulty with
 9 this concept that you really have got to see the fruit
 10 growing on the tree in real time.
 11 MR GARDINER: My Lady, my answer to that I think is this: in
 12 the cases where we're concerned with loans and
 13 instruments, you've got to look at all the surrounding
 14 circumstances and try to decide whether this was
 15 intended to be a permanent investment giving rise to
 16 interest accruing over a period of time. The intention
 17 of the parties --
 18 LADY JUSTICE GLOSTER: But we're not in that situation.
 19 MR GARDINER: Precisely, that is the point I was trying to
 20 make. We're not in that situation. The purpose one's
 21 got to look at is the purpose of Parliament in providing
 22 this regime. Was Parliament in this regime providing
 23 for the kind of animal that has been recognised in the
 24 tax cases as giving rise to yearly interest, ongoing
 25 interest accruing on an investment? Was that what

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1 Parliament was intending to provide?
 2 In my respectful submission, all the indications on
 3 the analysis of what is provided by rule 2 of 887 and
 4 the rest of rule 288 is this was simply a one-off
 5 retrospective payment out of the surplus. This was
 6 a distribution of the surplus in a particular way,
 7 one-off calculation. That is not something which is
 8 consistent with what has been recognised in tax law for
 9 centuries as constituting yearly interest.
 10 LORD DAVID RICHARDS: But the point my Lady is making is
 11 that these two cases, Barlow and Regal Hastings, don't
 12 fit with your template of what you say Parliament was
 13 intending to catch.
 14 MR GARDINER: My Lord, I obviously made the point badly.
 15 I would say they do because the analysis when you've got
 16 a breach of trust is you have to look at it on the basis
 17 that the person in breach has invested the money. The
 18 person chasing him is entitled to treat him as having
 19 invested the money and having invested it, so therefore
 20 the principal, and with interest accruing on it.
 21 LORD JUSTICE PATTEN: Well, you see, I'm just not quite sure
 22 that's right, Mr Gardiner. I mean, you've shown us the
 23 relevant passage but you see what I think the passage
 24 you refer to is saying is that if the trustee has -- not
 25 is deemed to have, but if the trustee has used the money

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<p>1 in his own business as opposed to just keeping it in the 2 bank or something, he's got to restore the fund. He's 3 got to return the money and he's got to return any 4 profits which he may have made from his use of the money 5 in that business.</p> <p>6 On the same premise, if you can't calculate 7 precisely what profits he has made or cannot be made to 8 what profits are attributable to such employment, 9 i.e. actual employment, then he has -- then what equity 10 does is to say, well, we're going to treat the money as 11 having earned for him in his business the equivalent of 12 5 per cent per annum.</p> <p>13 But where he hasn't employed it in his business so 14 that -- the beneficiary isn't there concerned to recover 15 the profits. He has an option to do, so but where that 16 isn't an alternative, he will get restoration of the -- 17 if it's money, the money, plus interest -- probably 18 might be compounded, it depends what period one is 19 talking about. But that's not on the basis of some 20 fiction that the trustee will have used it to invest or 21 anything of that kind. It would just simply be to 22 compensate the beneficiary for having been kept out of 23 the money that belongs to him.</p> <p>24 MR GARDINER: My Lord, I would think from what Lord Justice 25 James was saying, at least one of the threads of what he</p> <p style="text-align: center;">Page 37</p>	<p>1 investing the trust money in business..."</p> <p>2 So what the judge is dealing with here are different 3 situations. The first situation could arise where the 4 executor takes the money and blows it on a holiday, he's 5 going to have to repay that. So there's no question of 6 an investment there, he's just got to pay the money back 7 and interest.</p> <p>8 MR GARDINER: Yes. I mean, as I would say, he's got 9 an obligation to pay an amount of principal, and that 10 amount of principal is there. And as I would say, the 11 interest he has to pay is interest which accrues on that 12 principal from the date of the default.</p> <p>13 LORD DAVID RICHARDS: I see.</p> <p>14 MR GARDINER: I don't accept that the interest is created by 15 the court.</p> <p>16 LORD DAVID RICHARDS: What creates the interest?</p> <p>17 MR GARDINER: What creates the interest is the breach of 18 trust and the consequent obligations.</p> <p>19 LORD DAVID RICHARDS: It's the breach of trust?</p> <p>20 MR GARDINER: Yes.</p> <p>21 LORD DAVID RICHARDS: And the obligations resulting from --</p> <p>22 MR GARDINER: From that breach, my Lord, yes.</p> <p>23 LADY JUSTICE GLOSTER: It's imposed by the law as a result 24 of the breach of trust.</p> <p>25 MR GARDINER: My Lady, that's absolutely right. All the</p> <p style="text-align: center;">Page 39</p>
<p>1 was saying was that in certain circumstances you can 2 compensate for the loss and that may be a sufficient 3 compensation. That doesn't give rise to interest, 4 that's not relevant to us. The only situation that is 5 relevant to us is something that gives rise to interest.</p> <p>6 And as I read it that interest is then, as it were, 7 regarded as flowing from what the defaulter, the person 8 in breach should have done, and that was to invest that 9 money giving rise to that kind of return.</p> <p>10 LORD DAVID RICHARDS: I think what is said in this case 11 accurately states the position because at the top of 12 page 7 --</p> <p>13 MR GARDINER: My Lord, sorry, is it back in Vyse v Foster?</p> <p>14 LORD DAVID RICHARDS: Yes, I'm sorry. This is concerned 15 with executors, but it probably doesn't matter.</p> <p>16 The top of page 7 in the third line: 17 "If an executor commits a breach of trust, he and 18 all those who are accomplices with him in that breach of 19 trust are all and each of them bound to make good the 20 trust funds and interest..."</p> <p>21 That's the first situation. Then he goes on to a 22 second situation: 23 "If an executor ... makes profit by an improper 24 dealing ... that profit he must give up to the trust. 25 If that improper dealing consists in embarking or</p> <p style="text-align: center;">Page 38</p>	<p>1 court does frankly is to recognise what the law is.</p> <p>2 This court --</p> <p>3 LORD DAVID RICHARDS: All the court does --</p> <p>4 MR GARDINER: -- it doesn't create the law. It applies and 5 recognises the law.</p> <p>6 LORD DAVID RICHARDS: Can I put this to you: actually what 7 equity does is confer on the court a discretion to 8 compensate the trust -- and I am afraid I have to come 9 back to the question I was rather taxing you with 10 yesterday -- sorry, no pun intended -- what is the rate 11 of interest? The rate of interest is that which the 12 court orders.</p> <p>13 MR GARDINER: That may well be right, my Lord, and I tried 14 to answer that this morning. I obviously didn't --</p> <p>15 LADY JUSTICE GLOSTER: I mean, the point I am trying to make 16 is that you say that the obligation to pay interest is 17 not created by the court. But if it's the court that 18 sets the rate of interest, surely it has to be the court 19 that imposes the obligation, that creates the obligation 20 to pay interest?</p> <p>21 MR GARDINER: My Lord, two observations about that. I 22 studied my law a sufficiently long time ago and to think 23 historically about the difference between law and 24 equity --</p> <p>25 LORD DAVID RICHARDS: Good.</p> <p style="text-align: center;">Page 40</p>

<p>1 MR GARDINER: 1875, I mean, we've in a sense lost that 2 distinction. And I don't accept that today if you are 3 looking at an equitable remedy, you say that's always in 4 the discretion of the court. The court operates on the 5 basis of case law, principles, laid down for centuries 6 and all the rest of it. So at the end of the day, 7 I don't think if one comes to this court or any other 8 court and one's relying on an equitable remedy, it's 9 within the entire discretion of the court. The courts 10 are going to have to look at the principles, et cetera, 11 and on case law have they laid down these various 12 principles.</p> <p>13 The point your Lordship is putting to me is about 14 the rate. I would say if there is a breach of trust, 15 there is a liability. If there is a breach of trust, 16 there is a liability, and there may well be a consequent 17 obligation to pay interest. I merely say if and insofar 18 as the court has a discretion as to what is the rate of 19 interest to be paid, I would say in all those 20 circumstances that may affect the rate, but it's no 21 different from the situation where you may have 22 a fluctuating rate of interest. The actual obligation 23 as far as the interest is concerned is there and it 24 accrues.</p> <p>25 LORD DAVID RICHARDS: Yes.</p> <p style="text-align: center;">Page 41</p>	<p>1 So there it is, it's all very much of the same kind of 2 level as Barlow, so it wasn't in fraud:</p> <p>3 "But on the sole ground the defendants had acted 4 ... (Reading to the words)... the defendants were in 5 a fiduciary position to the plaintiff company, had made 6 a profit by the use of that position and must account." 7 Then you can see over the page at the top of the 8 right-hand column:</p> <p>9 "The sums of money which the defendants had bona 10 fide put into their own pockets were ... (Reading to the 11 words)... 4 per cent per annum and dates in October 12 and December 1935."</p> <p>13 You can see over the page 299, at the top of the 14 page:</p> <p>15 "It was part of the result of the application of the 16 equitable rule as the accountability of directors 17 standing in a fiduciary relationship to the company." 18 But then the point is at 299, the paragraph 19 beginning, "I have to deal with the facts of this case", 20 just towards the end of that:</p> <p>21 "Where the House of Lords has held in 1942 that the 22 defendants, the directors, are having treated to 23 ... (Reading to the words)... the sum of £1,402 in trust 24 for the plaintiff and that the directors must be taken 25 to have invested it at the moment they received it and</p> <p style="text-align: center;">Page 43</p>
<p>1 MR GARDINER: I'm sorry, I hadn't dealt with 2 Regal Hastings v Gulliver the decision of Mr Justice 3 Cassels. I can deal with it I think very shortly. This 4 is a set of reports, annotated tax cases which died 5 a death when I was the last editor of them many years 6 ago, but there we are.</p> <p>7 Mr Justice Cassels on page 298 --</p> <p>8 LADY JUSTICE GLOSTER: Sorry, which tab?</p> <p>9 MR GARDINER: Tab 14, my Lady.</p> <p>10 You'll remember this is the case where the directors 11 of the existing company took shares in the new company 12 and made profits from them. The question was whether 13 they had to calculate those profits and then interest on 14 that profit that they'd made.</p> <p>15 Mr Justice Cassels -- in those days when the long 16 vacation really existed, he was the judge in chambers in 17 the long vacation. But anyway, the left-hand column at 18 298, there's a paragraph beginning, "These defendants 19 were directors". He then refers to the facts. He then 20 makes the point -- my Lord, Lord Justice David Richards 21 made the point yesterday, that in 22 Regal Hastings v Gulliver, the argument -- it was 23 Patrick Hastings in first instance -- was all about 24 fraud and that was all abandoned at the 25 House of Lords and it was all breach of fiduciary duty.</p> <p style="text-align: center;">Page 42</p>	<p>1 therefore must pay interest from that moment to the time 2 six and a half years later when the 3 House of Lords declared the defendants liable."</p> <p>4 So in my respectful submission, that's what the 5 learned judge below said. It seems to me to be the 6 ratio of his judgment that the directors must be taken 7 to have invested it and then with interest at that rate 8 accruing on that investment.</p> <p>9 LORD DAVID RICHARDS: There's a passage towards the end of 10 the judgment which Mr Gammie referred us to.</p> <p>11 MR GARDINER: My Lord, that's absolutely right, and the 12 learned judge deals with that in his judgment.</p> <p>13 LORD DAVID RICHARDS: What do you say about -- this is the 14 passage which begins the right-hand column on page 300, 15 "this is a case of interest".</p> <p>16 MR GARDINER: Yes.</p> <p>17 "This is a case of interest which nobody knew would 18 be payable, and the rate of which was unknown, until the 19 House of Lords gave its decision and indicated the rate. 20 I do not think the amount of interest became due until 21 the date of that decision."</p> <p>22 I think the judge is right actually in saying that 23 that is actually somewhat inconsistent with what appears 24 to be the ratio of his judgment, which is what I just 25 read. It comes back to the point I think I was making,</p> <p style="text-align: center;">Page 44</p>

<p>1 and no doubt making rather badly, that as a matter of 2 law, if there is a breach of trust of fiduciary duty 3 there is a liability in law from that moment. 4 LADY JUSTICE GLOSTER: So you would say that the judge -- 5 that Cassels got it wrong, Cassels J got it wrong when 6 he said, "I do not think the amount of interest became 7 due until the date of that decision"? 8 MR GARDINER: My Lady, yes. 9 LADY JUSTICE GLOSTER: It may not have been payable for 10 obvious reasons, but it certainly was due in the sense 11 there was -- 12 MR GARDINER: That, we say, is inconsistent with the earlier 13 passage in his judgment. 14 LORD JUSTICE PATTEN: And the interest became due because 15 what? There was an obligation on the trustees to pay 16 interest from the breach? 17 MR GARDINER: My Lord, yes, I mean that's what he says 18 earlier in his judgment, that the directors have to be 19 treated as having invested the money that they made 20 because they were in breach of their fiduciary duty, and 21 therefore to invest it at that particular rate, 22 6.5 per cent. 23 LADY JUSTICE GLOSTER: And they were depriving the other 24 shareholders or the company -- 25 MR GARDINER: Of their money,yes.</p> <p style="text-align: center;">Page 45</p>	<p>1 rude about the judges, but neither of them are 2 celebrated judicial figures in our history. 3 LORD DAVID RICHARDS: No one said they are wrong 4 subsequently. 5 MR GARDINER: No, and I think this is the only case where 6 anybody has actually managed to get together these cases 7 and cite them. 8 LORD DAVID RICHARDS: Well, presumably whenever anyone is 9 held liable to account in the way the defendants were in 10 this case, tax needs to be deducted if it falls within 11 the other criteria. Presumably these cases have been 12 applied since then and no one has sought to challenge 13 them. 14 MR GARDINER: I haven't double-checked but I'm not aware of 15 them having been cited in other authorities. 16 LORD DAVID RICHARDS: No. 17 MR GARDINER: I mean, we did do -- 18 LORD DAVID RICHARDS: No, I am sure that has been 19 researched, I'm quite sure. Quite. 20 MR GARDINER: And just to get rid of all of the 21 authorities -- and I am conscious I am going on longer 22 than anticipated -- Barnato, I mean I re-read last night 23 and I don't think one gets anything out of Barnato, 24 frankly. I think it's simply a question of a case there 25 where there was a mess as far as the partnerships were</p> <p style="text-align: center;">Page 47</p>
<p>1 LADY JUSTICE GLOSTER: -- of the money. 2 MR GARDINER: That's right. 3 LORD JUSTICE PATTEN: I mean, that, it might be said, is 4 simply the hypothesis that equity constructs in order to 5 calculate the amount of compensation that should be 6 payable. They're not meaning by that that there was an 7 actual sort of legal obligation to pay that arose during 8 that time. 9 MR GARDINER: Well, all I am saying my Lord is that looking 10 at that case and the basis of it one has something which 11 is analogous to all the other authorities of individuals 12 making loans and investments, et cetera. Therefore it 13 fits within the concept of the other authorities as 14 giving rise to accruing interest. 15 That's what I said at the beginning. If they are 16 saying something different to that then it may well be 17 that they are wrongly decided. I think it's difficult 18 to say that they are wrongly decided against the 19 consistent line of authority, but Mr Justice Finlay at 20 least is clearly following <i>Bebb v Bunny</i>. He must have 21 been thinking that <i>Bebb v Bunny</i> was satisfied in that 22 particular case of something of that particular nature 23 with interest accruing. 24 But I mean also the argument in this case has been 25 built on these two authorities, and I don't want to be</p> <p style="text-align: center;">Page 46</p>	<p>1 concerned, there was a claim in respect of the amount 2 that the individual was entitled to, it was all wrapped 3 up into one compensatory amount as it were; but of 4 course actually, in reality, part of this is interest. 5 Therefore I mean they dissected the amount and said it's 6 interest. That's what its relevance was to the argument 7 of Mr Grant in <i>Riches v Westminster Bank</i>, because if you 8 remember Mr Grant's argument was, "This is compensation 9 for our clients, it's not interest." That's what the 10 relevance of <i>Barnato</i> was. 11 Could I just go to <i>Riches v Westminster Bank</i>? 12 LADY JUSTICE GLOSTER: Sorry, just stopping with <i>Barnato</i>. 13 Why isn't it a similar example of <i>Regal Hastings</i> where, 14 albeit in the partnership context, he is getting 15 a package, the claimant is getting a composite package, 16 and he doesn't get compound interest until he goes back 17 to court and gets it? And the issue is whether 18 a retrospective payment package can be analysed down as 19 being yearly interest. 20 MR GARDINER: No, I think, with respect, my Lady, it's 21 whether it's yearly interest or not. 22 LADY JUSTICE GLOSTER: Yes, obviously not -- but it's 23 whether the interest element of the single capital sum 24 which was awarded can be regarded as yearly interest, or 25 the court said it could.</p> <p style="text-align: center;">Page 48</p>

<p>1 MR GARDINER: As I read it it's simply a question of whether 2 it's interest, it's not yearly interest. If one starts 3 with Lord Wright's judgment at 497. 4 LADY JUSTICE GLOSTER: 49? 5 MR GARDINER: 497, right at the beginning of his judgment, 6 it's not a very long judgment, but at the first break on 7 that page, 497: 8 "The question involved is whether these sums which 9 have been assessed as super tax contained interest in 10 them accessible as interest or income to income tax." 11 (quote unchecked) 12 It's not making a distinction saying that they are 13 yearly interest, it simply goes to whether they are 14 interest or not. 15 That is as I read his judgment. I mean at the top 16 of page 499 it supports that. Again, they are relying 17 on the case of -- 18 LADY JUSTICE GLOSTER: It's just interest, it's not yearly 19 interest. 20 MR GARDINER: No, it's just interest. 21 LORD JUSTICE PATTEN: But isn't that because -- I can't 22 remember, I looked through this last night and 23 somewhere, I can't now find it of course -- but I think 24 when you looked at the taxing provision it covered all 25 forms of interest.</p> <p style="text-align: center;">Page 49</p>	<p>1 to that first issue. 2 LORD DAVID RICHARDS: Principally, yes. 3 MR GARDINER: What is more relevant to us is the second 4 issue. 5 LORD DAVID RICHARDS: I follow. 6 LORD JUSTICE PATTEN: I mean, this -- yes. So I mean this 7 Barnato was principally relevant to the question of 8 whether it was capital or income. 9 MR GARDINER: My Lord, yes, whether it was compensation and 10 not interest at all. 11 LORD JUSTICE PATTEN: The figures are astonishing. 12 MR GARDINER: I know, Vyse v Foster and Benarto. 13 LORD JUSTICE PATTEN: Woolf Barnato was the man who raced 14 the blue train back from the Riviera in his Bentley, 15 wasn't he? 16 LADY JUSTICE GLOSTER: That's a wonderful bit of knowledge! 17 MR GARDINER: It proves you get a little bit of amusement 18 out of tax cases occasionally! 19 But I do want to just ask you to look again at 20 Riches v Westminster Bank because my learned friend was 21 attempting, if I understood him yesterday, to make 22 a point that this case was about yearly interest and it 23 wasn't. So it's about interest of money, Riches, and 24 I want to just show you the passages. He in particular 25 drew your attention to a passage in the speech of</p> <p style="text-align: center;">Page 51</p>
<p>1 LORD DAVID RICHARDS: I think, yes, page 514. 2 MR GARDINER: 514, my Lord. It's the first page, "There's 3 only one other matter to which I have to refer." 4 LORD JUSTICE PATTEN: "Any interest in money, whether yearly 5 or otherwise." 6 MR GARDINER: That's right. 7 LORD JUSTICE PATTEN: Which I why I find it a bit puzzling 8 in relation to the case we were looking at, the Barlow 9 case, as to why it mattered it was yearly interest. 10 MR GARDINER: Well, I mean that's right. I mean, he then 11 went on to refer to Vyse v Foster. 12 LORD DAVID RICHARDS: In Barlow weren't there two issues? 13 One, whether it was interest, therefore whether the 14 taxpayer was liable to income tax on it. Secondly, if 15 the answer to that was yes, then whether it was yearly 16 interest so entitling him to make a deduction for tax 17 purposes. Weren't those two issues in Barlow, and 18 really Benarto principally went to the first of those 19 issues? 20 MR GARDINER: My Lord, I suspect your Lordship is right as 21 usual, but if I could just ... yes, I mean 22 your Lordship, as usual, is absolutely right. I mean, 23 the Special Commissioners decided it was a capital sum, 24 having saying that was wrong. Yes, I'm grateful, yes. 25 So there were two issues, and Benarto was relevant</p> <p style="text-align: center;">Page 50</p>	<p>1 Viscount Simon. But could I just look at it more 2 closely. 3 It's tab 15. The headnote, you'll see the fourth 4 line down the question is, is this interest of money 5 within the meaning of schedule D? 6 LORD JUSTICE PATTEN: Sorry, which page are we on? 7 MR GARDINER: This is headnote, my Lord, of Riches. 8 LORD JUSTICE PATTEN: Yes. 9 MR GARDINER: The fourth line down on the headnote the 10 question is, is this interest of money within the 11 meaning of schedule D? As far as schedule is concerned 12 it brings into charge all interest, whether yearly or 13 otherwise. So that's the question that arises in this 14 case. There's not only a separate question of whether 15 it's yearly interest, it's just interest. 16 As at this time the two tax deduction at source 17 provisions were rules 19 and 21. That's the income tax 18 Act 1918. It might be helpful if I just asked you to 19 look at paragraphs 13 of the appendix to our skeleton. 20 LORD JUSTICE PATTEN: 30, did you say? 21 MR GARDINER: Paragraph 13 to the appendix to our skeleton, 22 my Lord, which sets out, rather than me just making the 23 point, it sets it out there. So our skeleton, 24 paragraph 13, we say: 25 "The legislation was consolidated in the Income Tax</p> <p style="text-align: center;">Page 52</p>

<p>1 Act 1918 which preserved this dichotomy." 2 This is the dichotomy between the rates charged on 3 yearly interest and the rates on other interest: 4 "Rule 21 of the General Rules Applicable to all 5 Schedules of the the Income Tax Act 1918 provided for 6 the mandatory deduction of tax at source where interest 7 (of any kind)..." 8 If I just pause there. So rule 21 applies to all 9 interest, not yearly interest, it applies to yearly 10 interest and all other kinds of interest: 11 "... was not wholly paid out of taxed income (and 12 for the rendering of an account and payment to the 13 Revenue); whereas rule 19 permitted the deduction (and 14 retention) of tax at source where yearly interest was 15 paid out of wholly taxed income." 16 Now, the actual deduction of tax at source provision 17 that was concerned in Riches was rule 21 which is all 18 interest, not yearly interest. One can see that from 19 the point in the headnote which is accurate. But you 20 can also see the from the arguments of counsel on 21 page 392, with Mr Grant, with Mr Mustoe, and about six 22 or seven lines down from the summary of their argument 23 it says: 24 "Interest under section 3 is of the same character 25 as interest under sections 28 and 29 of the Act of 1933</p> <p style="text-align: center;">Page 53</p>	<p>1 Just for the sake of getting it right and accurate 2 again, it's the same with Lord Donovan, as he then was. 3 If you look on page 395, appearing for the Revenue, 4 you'll see about 10 or 12 lines down, or perhaps 5 earlier, 6 or 8 lines down, the expression: 6 "... 'all interest of money' in schedule D, para 7 I(b) of The Income Tax Act, 1918, and is liable to 8 income tax thereunder. The interest being paid wholly 9 out of profits and gains not brought into charge to tax, 10 the respondents were bound to deduct tax therefrom on 11 payment and to account for that tax to the Inland 12 Revenue Commissioners under rule 21 of the All Schedules 13 Rules." 14 So both counsel plainly accept that the only issue 15 in the case was is this interest of money generally 16 under rule 21? It was not a question of could there be 17 any question of yearly interest under rule 19. 18 Now, the passage that my learned friend read to you 19 -- as I understood him he was purporting to suggest that 20 the case was about yearly interest -- is in the speech 21 of Viscount Simon at the beginning. And all 22 Viscount Simon is saying is that is this interest of 23 money, and he then talks about the two possible 24 deduction at source provisions, but he's just talking in 25 general terms of one or the other, he is most certainly</p> <p style="text-align: center;">Page 55</p>
<p>1 which, being an award of damages or in the nature of 2 damages, could not be 'annual profits or gains' [they 3 say] within paragraph I(a) of schedule D, nor 'interest 4 of money' within paragraph I(b) of schedule D, rule I(a) 5 of case III of schedule D and rule 21 of the All 6 Schedules Rules of the Income Tax Act, 1918." 7 LADY JUSTICE GLOSTER: So the issue is between interest 8 and -- 9 MR GARDINER: Damages. 10 LADY JUSTICE GLOSTER: -- and damages, not interest and 11 yearly interest. 12 MR GARDINER: My Lady, that's absolutely correct, yes. 13 LORD JUSTICE PATTEN: So under the legislation at that time 14 there was mandatory deduction for purposes of passing 15 the task on to the Revenue, rather as the provision 16 here, in relation to all kinds of interest. 17 MR GARDINER: My Lord, yes. 18 LORD JUSTICE PATTEN: It was only in relation to the ability 19 to deduct and retain the tax that it was limited to -- 20 MR GARDINER: Yearly interest. 21 LORD JUSTICE PATTEN: -- to yearly interest. 22 MR GARDINER: Yes. Therefore this case is concerned with 23 rule 21 which is applicable just to all interest. 24 That's why the headnote is right, they're talking about 25 just all interest.</p> <p style="text-align: center;">Page 54</p>	<p>1 not saying the case is about yearly interest because 2 that's completely contrary to the whole basis on which 3 the case was argued and indeed is recognised. I mean, 4 if one sees he refers to the Law Reform (Miscellaneous 5 Provisions) Act, 1934, as interest, and included the 6 total sum for which judgment is given is "interest of 7 money" within the meaning of schedule D to the Income 8 Tax Act, 1918. 9 LADY JUSTICE GLOSTER: So no issue about yearly. 10 MR GARDINER: That's right. He just simply refers to the 11 two deduction rules, rule 21 and rule 19. But he's not 12 suggesting for one moment that rule 19 applies, he just 13 simply refers to the fact that there are two deduction 14 rules. The real question is whether this is interest of 15 money. 16 If one looks at the other judges there's not really 17 anything greater ... yes, one could see Lord Wright is 18 again on the ball with the right provision. Six or 19 seven lines up from the end of page 399 he says: 20 "... in the true sense of that word because it is 21 not interest but damages, that is, damages for the 22 detention of a sum of money due by the respondents to 23 the appellant and hence the deduction made is being 24 required under rule 21 is not justified because the 25 money was not interest."</p> <p style="text-align: center;">Page 56</p>

<p>1 LORD JUSTICE PATTEN: What about the point at 398? 2 "Mr Grant advanced a further argument that the added 3 sum was not in the nature of 'interest'..." 4 So we're talking about interest: 5 "... in the sense of that expression in the in the 6 Income Tax Acts because the added sum only came into 7 existence when the judgment was given and from that 8 moment had no accretions under the order..." 9 LADY JUSTICE GLOSTER: I mean, that's the parallel, isn't 10 it? 11 MR GARDINER: Yes, that's an argument for saying that it's 12 not interest and they say it is interest. We conceded 13 from the start, I mean it's the same terminology 14 as Mr Donovan, as he then was, put in argument, it's 15 interest because the statute says it's interest. We've 16 always conceded this is interest because the statute 17 says it's interest, the question is whether it's yearly 18 interest or not. So that was Mr Grant's argument in 19 that particular case. I mean, in that particular case 20 it seems to me the interest accrued anyway. 21 LADY JUSTICE GLOSTER: I mean, there is a difficulty 22 potentially with your argument, if the plank of your 23 argument is there's got to be an actual accrual under 24 an instrument envisaging a tract of longer than a year. 25 MR GARDINER: Of an investment. I perfectly well accept</p> <p style="text-align: center;">Page 57</p>	<p>1 an award -- it was an award of interest under the 1934 2 Act, so it wasn't in fact accruing day by day over the 3 period because it was awarded at the end of the period, 4 but he is -- 5 MR GARDINER: But he seems to think it was accruing. 6 LORD DAVID RICHARDS: Well, he is saying it's treated as 7 such, really, isn't he? 8 MR GARDINER: The size of which grows from day to day ... 9 LORD DAVID RICHARDS: You may say once the award is made 10 that is -- the effect of that is that interest has 11 grown, one might say accrued, day by day over the 12 period, it seems to me what Viscount Simon is envisaging 13 here. 14 MR GARDINER: There are two ways of reading it, if I could 15 put it this way. One way of reading it is that the 16 court has determined that the liability is X amount of 17 principal and interest accrued on that over a period of 18 time. That is, in my terminology, a true accrual. The 19 other way of reading it is because the court has decided 20 that X was the amount that was payable, and that it's 21 deemed to have interest on it, that is retrospectively 22 deemed to have accrued. Now, as I see it, it's the 23 first of those alternatives which is correct, in my 24 respectful submission. 25 LORD DAVID RICHARDS: What, that even before the court's</p> <p style="text-align: center;">Page 59</p>
<p>1 my Lord, Lord Justice David Richards' point, that 2 I would have been better using the terminology 3 "investment". 4 LADY JUSTICE GLOSTER: You would be --? 5 MR GARDINER: Using the terminology "investment" rather than 6 "instrument". I was trying to use a neutral term but 7 "investment" is more consistent with what is said in the 8 authorities. 9 LORD DAVID RICHARDS: The way that Viscount Simon puts it in 10 this paragraph to which my Lord has referred, towards 11 the end, he treats the interest as growing from day to 12 day. Clearly in legal terms it wasn't. 13 MR GARDINER: My Lord, is that on page 403? 14 LORD DAVID RICHARDS: 398. 15 MR GARDINER: 398. 16 LADY JUSTICE GLOSTER: It's this fruit of the tree stuff 17 again. I mean, it's deemed fruit of the tree, isn't it? 18 LORD DAVID RICHARDS: Yes. It's the second half of that 19 paragraph. 20 MR GARDINER: I think in that case -- I mean, that was 21 a case -- I mean Lord Wright is saying that, yes, it 22 accrued over the period. 23 LORD DAVID RICHARDS: It's Viscount Simon, I think. 24 MR GARDINER: Sorry, yes. 25 LORD DAVID RICHARDS: But it didn't because this was</p> <p style="text-align: center;">Page 58</p>	<p>1 order was made under the 1934 Act interest was accruing? 2 MR GARDINER: Yes, for the simple reason it was the kind of 3 situation in which one could envisage that the court 4 would award interest. As Lord Denning says, I mean when 5 we look at the sort of subsequent cases in the 6 Court of Appeal, that courts have always proceeded on 7 a particular basis of awarding interest in the right 8 circumstances. 9 LADY JUSTICE GLOSTER: What Jefford v Gee, you mean? 10 MR GARDINER: Yes, that's what he says, "Now we've got 11 an absolute mandatory obligation because of the 1969 12 Act, but in fact we've always proceeded on a particular 13 basis and that's why we're going to award interest in 14 this particular case." Because in that particular case 15 the date on which they had to determine it was just 16 prior to the application of the 1969 Act. 17 So I think what he is saying is that, as a matter of 18 ordinary obligation, ordinary practice of the court, the 19 court would actually order interest in those 20 circumstances. Therefore, I would say, consistent with 21 my submissions, you can regard that as interest 22 accruing. 23 LADY JUSTICE GLOSTER: But I mean here it's even more 24 certain that provided there's a surplus because there's 25 a statutory obligation to pay interest.</p> <p style="text-align: center;">Page 60</p>

1 MR GARDINER: Well, once you've got to a surplus, my Lady,
 2 yes, you've got that; but in my respectful submission
 3 there's no accrual during the time when the principal is
 4 outstanding which, in my respectful submission, is the
 5 acid test. I think you'll probably be glad to hear,
 6 I think, that I've got very close to concluding and I've
 7 been longer than I anticipated.
 8 I did start actually yesterday by inviting you all
 9 to look at paragraph 34 of the judge's judgment and
 10 drawing particular attention to subparagraphs 1, 2 and
 11 3.
 12 LADY JUSTICE GLOSTER: Those are your submissions.
 13 MR GARDINER: I was then taken off on a tangent and I never
 14 actually got to 2 and 3. So could I actually --
 15 LADY JUSTICE GLOSTER: I don't think we've been that much of
 16 bullies towards you.
 17 MR GARDINER: Go to the judge's judgment.
 18 I mean, my learned friend Mr Gammie hasn't actually
 19 taken you to the judge's judgment, and obviously we all
 20 respect the fact that you would have read it and thought
 21 about it, but we haven't had any particular criticisms
 22 of the judge's judgment from him. Therefore, I am not
 23 going to spend as much time as I otherwise would have
 24 done.
 25 But 34(1) I dealt with as being our primary point

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1 and I would like to look in some length in dealing with
 2 that. If I could just refer you back to (2) and (3),
 3 and paragraph 34 of the judge's judgment, our contention
 4 is:
 5 "The interest payable is a purely statutory
 6 entitlement created by rule 288(7) as to the way in
 7 which a surplus is to be distributed. It is not based
 8 on any shared intention or accommodation between the
 9 parties and there is no underlying transaction akin to a
 10 loan or investment such as in the other cases in which
 11 the quality of yearly interest has been held to have
 12 been satisfied. A statutory scheme of distribution is
 13 not an accommodation for the payment of yearly
 14 interest."
 15 Then (3):
 16 "The right to interest under the statutory scheme is
 17 not referable to an obligation having a tract of future
 18 time."
 19 That's a reference to Lord Johnson in the Scottish
 20 North American Trust case, and in our skeleton we the
 21 set out the relevant passage:
 22 "The right to interest only rises on the
 23 ascertainment of a surplus and on the basis that the
 24 principal has been repaid. There is no period of time
 25 during which a right to interest under rule 288(7)

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1 exists and the principal is outstanding on which any
 2 such right to interest accrues."
 3 I have left then to last the case -- well two cases,
 4 actually, I haven't shown you Garston and I had better
 5 show you that and then Gateshead. Could I just ask you
 6 to look fairly briefly at Garston. It was the case that
 7 my learned friend referred to yesterday in that passage
 8 in the transcript that I asked you to look at, and
 9 Garston is at tab 10.
 10 It's a decision of Mr Justice Rowlatt. For those of
 11 us who read the tax cases Mr Justice Rowlatt was one of
 12 these people who usually managed to make quite a number
 13 of corrections to his judgments when they went into the
 14 law reports, but this is in the law report so this is
 15 the judgment as corrected by him. If you just look at
 16 the headnote here, one will see what it's about, it's
 17 a very short headnote:
 18 "The overseers of the poor for a certain district
 19 kept a current account with a bank, into which they paid
 20 the amounts collected by them as poor rate, and out of
 21 which from time to time they made the payments for which
 22 they were liable. Under a long-standing arrangement
 23 with the bank interest was allowed by the bank
 24 half-yearly at an agreed rate, without deduction of
 25 income tax, calculated upon the daily balances standing

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1 to the credit of the overseers."
 2 So if it had been yearly interest it should have had
 3 deduction of income tax:
 4 "The overseers, contending that they were trustees
 5 for charitable purposes only within section 105 of the
 6 Income Tax Act, 1842, claimed an exemption from income
 7 tax in respect of the interest on the ground that it was
 8 'yearly interest' within that section. On a case stated
 9 raising this latter question only: Held, that the
 10 interest was not 'yearly interest'..."
 11 So the sole question in the case is the one that is
 12 relevant for our purposes, whether it's yearly interest
 13 or not.
 14 Mr Justice Rowlatt, it's pages 386 to 387, and he
 15 refers to section 105 in the passage beginning just
 16 above the middle of the page, but then he refers to the
 17 counsel in the case Mr Montgomery, and if I could just
 18 read that little passage:
 19 "Mr Montgomery has argued the case very exhaustively
 20 and clearly, admitted that he thought yearly interest in
 21 section 105 means the same as yearly interest in section
 22 40..."
 23 Section 40 is the deduction provision that the cases
 24 are concerned with, which is similar to 874 in our case.
 25 "...and other sections of the Act of 1853. The

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1 cases under those sections are, therefore, the cases
 2 which must be looked at as throwing light upon what is
 3 yearly interest under this section. The broad result of
 4 the decisions in those cases is, I think, that yearly
 5 interest means, substantially, interest irrespective of
 6 the precise time in which it is collected [and note that
 7 terminology], interest on sums which are outstanding by
 8 way of investment as opposed to short loans or as
 9 opposed to moneys presently payable or held over or
 10 anything of that kind."
 11 LADY JUSTICE GLOSTER: Mr Gardiner, the Revenue accept that
 12 if the monies had not been outstanding for as long as
 13 a year then it wouldn't be yearly interest.
 14 MR GARDINER: My Lady, that's absolutely correct.
 15 LADY JUSTICE GLOSTER: That's right, isn't it? I struggle
 16 with that as a principal reason -- and this is the
 17 question I need to ask Mr Gammie rather than you -- but
 18 I slightly struggle with that as a principal reason for
 19 saying this isn't yearly interest just because the
 20 period of time during which the money has been
 21 outstanding exceeds a year.
 22 MR GARDINER: Yes. My Lady, as I said, what one needs is
 23 something in the nature of an ongoing investment giving
 24 rise to accruing interest. But obviously if you have
 25 something that is only short-term that is, as I said

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1 earlier this morning, defined as being a loan only
 2 outstanding for six months or seven days, then that
 3 can't be yearly interest because it fails the word
 4 "yearly test" for that reason alone.
 5 LADY JUSTICE GLOSTER: I mean in the counterfactual
 6 situation where there hadn't been all this litigation
 7 the interest from the surplus would have been paid out
 8 pronto pronto.
 9 MR GARDINER: Absolutely, but the problem is they would
 10 still say it's still yearly interest because it's
 11 calculated by reference to the prior period.
 12 LADY JUSTICE GLOSTER: Yes. But I mean if -- yes.
 13 MR GARDINER: The prior period is a period that goes back to
 14 2008.
 15 LADY JUSTICE GLOSTER: Yes. But I mean theoretically, as
 16 you said, in a simple administration it may not have
 17 been.
 18 MR GARDINER: That's absolutely right, and that is one or
 19 two of the points that we made and in their supplemental
 20 skeleton -- I don't want to go into that because my
 21 learned friend hasn't gone into it -- but you would have
 22 the problems in administration of some people being
 23 treated as receiving yearly interest and some people not
 24 being treated as receiving yearly interest simply by
 25 reference to the period. I mean, not in this

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1 administration because it's taken so long.
 2 LADY JUSTICE GLOSTER: I don't think my heart bleeds for the
 3 problems of the administrators, speaking for myself.
 4 MR GARDINER: That's why I haven't made any point about it.
 5 But it's worthwhile, I mean perhaps could I just
 6 very briefly, it might be more sensible if I ask you, my
 7 Lady, just to read the next paragraph towards the end of
 8 his judgment which I mean the learned judge below has
 9 found of some assistance.
 10 (Pause)
 11 LORD DAVID RICHARDS: This is the paragraph?
 12 MR GARDINER: Beginning, "Therefore I have to consider the
 13 position of the appellants".
 14 LADY JUSTICE GLOSTER: Yes.
 15 MR GARDINER: Then the final case I want to deal with is
 16 Gateshead, which in many ways we say is the most
 17 significant case in this case because we say properly
 18 understood it does establish that the proposition
 19 advanced on behalf of the Revenue here can't be right.
 20 It is not just a question of the calculation of a period
 21 in excess of a year that determines whether you have
 22 yearly interest or not. Garston is clearly authority
 23 against that proposition, as indeed my learned friend
 24 was forced into in effect acknowledging yesterday
 25 morning. But.

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1 Gateshead is clearly authority against that
 2 proposition. It is a decision of a very distinguished
 3 Court of Appeal, that is this court, and I know it's
 4 a long time ago, but there's a lot that one can actually
 5 see from Gateshead. It's tab 9.
 6 If I could just in summary make the points, before
 7 I go to it, of what is the real significance of
 8 Gateshead. First of all, we say it rejects the
 9 self-same argument as is put forward here. If one looks
 10 at the actual argument presented by counsel in that
 11 case, it is, on analysis at its heart, the same argument
 12 as is put forward here.
 13 That's the first point we make.
 14 The second point we make is that that case gives
 15 a very real and apt analogy to the situation here. The
 16 ratio of Lord Sumner's judgment in that case was that
 17 there was no intention to have an ongoing investment
 18 there yielding interest. But it was, as he put it,
 19 merely a forbearance collect a sum due with the
 20 consequence that interest was paid for years on the
 21 amounts outstanding.
 22 That's where I take the analogy with this situation.
 23 The creditors here didn't intend to make a long-term
 24 investment here with Lehmans or the administrators, they
 25 have been caught by the act of administration. I would

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<p>1 say, to put it in an analogous terminology, they have 2 been caught by an enforced forbearance of the repayment 3 of their monies. 4 The distinction, therefore, between this case and 5 a case where you can have an investment giving rise to 6 yearly interest is precisely the same in this case as it 7 was in Gateshead. We say Gateshead is clear authority 8 against the argument on the other side, certainly at 9 least against the arguments set out in the grounds of 10 appeal in the skeleton. Of course I don't need to 11 remind you, my Lady, it's an authority which is of this 12 court and binding on this court. 13 So if we could perhaps just look at it. 14 LADY JUSTICE GLOSTER: But I mean you could say the same 15 would go for a beneficiary in a relationship with 16 a trustee breaching his trust and having to account, the 17 beneficiary wouldn't have, if he had known about it, 18 have wanted his monies invested wrongly with that 19 trustee. 20 MR GARDINER: But as a matter of law the beneficiary would 21 always have had the right to get the money back from his 22 trustee by taking proceedings against him. The question 23 of forbearance is very much the one here. The creditor, 24 I mean in respect of a company in administration, 25 doesn't have that right and he will only actually get</p> <p style="text-align: center;">Page 69</p>	<p>1 Act 1853, which is the deduction at source provision 2 that was the subject matter of <i>Bebb v Bunny</i>, et cetera. 3 They then go on: 4 "... and that therefore the customer was not 5 entitled to deduct income tax from such interest. The 6 ground of the decision is that in that case was that the 7 loan was for a specified time less than a year..." 8 So that's what they are saying is the gravamen, as 9 it were, of the distinction with yearly interest: 10 "... as Bowen LJ said, 'We are dealing in this case 11 with short loans only, that is to say, with loans made 12 for a period short of one year, loans which are not 13 intended to be continued, and are not continued, for a 14 long period.' In order to make the case out of the 15 provisions of section 40 there must be a stipulation 16 that the loan shall not be for more than a year, and the 17 person who relies upon that stipulation must prove it. 18 The money here has remained unpaid for years, the 19 interest being calculated with reference to a year, and 20 therefore section 40 applies. There is no fixed period 21 under section 32 of the <i>Gateshead Improvement Act</i> ... 22 during which the money is not to be called in. There is 23 no stipulated period less than a year." 24 So there's the argument for saying that this has to 25 be yearly interest, and it's an argument simply by</p> <p style="text-align: center;">Page 71</p>
<p>1 a right to receive his monies back in accordance with 2 the statutory provisions and the acts in accordance with 3 those statutory provisions of the administrators. 4 LADY JUSTICE GLOSTER: So you say that the involuntary 5 nature of the "non-investment" -- 6 MR GARDINER: Yes, once one realises that, and this the 7 basis, this is the ratio of Lord Sumner's, of the Master 8 of the Rolls' judgment, in <i>Gateshead</i>. If I could just 9 take you to it. 10 We haven't looked at it in any detail at all but, as 11 I say, because of its significance I need to. If we 12 could just perhaps look at the headnote. 13 LADY JUSTICE GLOSTER: We can read this to ourselves, shall 14 we? 15 MR GARDINER: I'm grateful. If you could just perhaps read 16 the headnote. 17 (Pause) 18 LORD JUSTICE PATTEN: There was a sort of <i>Bower v Marris</i> 19 appropriation of the payments. 20 MR GARDINER: My Lord, yes, there's a lot of analogies to 21 this case, yes. 22 But if one looks at -- if you have managed to read 23 the headnote -- if one looks at the argument, the 24 argument on page 885 of Mr Ryde and Mr Newbolt for the 25 defendant, they refer to section 40 of the Income Tax</p> <p style="text-align: center;">Page 70</p>	<p>1 reference to the period. 2 One could pick it up towards the end of page 886, 3 and again in the argument of counsel, the penultimate 4 line on the page, the sentence beginning: 5 "Here the plaintiffs assented to the money remaining 6 unpaid, and to its bearing interest at the rate of 7 5 per cent per annum, and it remained outstanding for 8 many years, though they could have called it in at any 9 time." 10 That, therefore, is the argument put up. Then 11 you'll see that counsel for the plaintiffs weren't 12 actually called upon. 13 Lord Sumner refers to the facts, but I think one has 14 got them sufficiently from the headnote at the 15 beginning. But at page 888, third line down from the 16 top of the page: 17 "The contention is that in all cases, except where 18 such a period is fixed by agreement between the parties, 19 there is a payment of yearly interest of money within 20 the meaning of section 40 if the money remains for more 21 than a year outstanding and interest bearing." 22 That is precisely the same argument as is put 23 forward here. That's the argument that he rejects. If 24 I could pick it up with the next paragraph beginning 25 "The facts are of the most meagre description", but if</p> <p style="text-align: center;">Page 72</p>

<p>1 I go about eight or nine lines down there's a sentence 2 beginning "There is no trace of anything more". 3 LADY JUSTICE GLOSTER: Do you want us to read this? 4 MR GARDINER: Yes, I'm grateful, my Lady. 5 (Pause) 6 In fact, if I could ask you all to read the whole of 7 the judgment. 8 LADY JUSTICE GLOSTER: Yes. 9 MR GARDINER: I think I have made my points, I mean prior to 10 actually looking at it, as to the significance of the 11 case, but it does establish, at least in my respectful 12 submission, the first proposition, and that is that 13 a mere period of calculation in excess of a year is not 14 the determinant of something constituting yearly 15 interest. And there can be no doubt whatsoever, in my 16 respectful submission of that, yet that is the whole 17 basis of the grounds of appeal in this case, the case of 18 HMRC and their skeleton argument. It's paragraph 2 of 19 the skeleton argument on the other side. The period of 20 calculation in excess of a year is what determines 21 yearly interest. 22 I am sure you have read that, and I don't want to 23 read my learned friend's argument, but it is 24 paragraph 2. 25 LORD JUSTICE PATTEN: So, sorry, just so I am clear, and the</p> <p style="text-align: center;">Page 73</p>	<p>1 shewn by the evidence that the corporation followed a 2 regular practice of investing their funds by allowing 3 time ..." 4 So he is contrasting a situation where interest has 5 actually arisen and is payable for a period in excess of 6 a year with a situation where there is a true investment 7 accruing interest over a period of time in excess of 8 a year. As I read it, it's the contrast between the 9 passage on page 888 and the passage on page 889. 10 The other two judges, Lord Justice Kennedy 11 Mr Justice Lawrence, simply agreed. 12 That point is made out I think very well from the 13 concluding sentence of the main paragraph at 890, where 14 he says: 15 "The plaintiffs were no doubt to receive interest on 16 it, but not in such a form as would apply to it the 17 words 'any yearly interest of money' in section 40 of 18 the Income Tax Act 1853." 19 The form must be going back to his distinction 20 between a forbearance of allowing interest flowing for 21 more than a year and an investment and interest accruing 22 on it. 23 LORD DAVID RICHARDS: In the breach of trust cases if the 24 beneficiaries discovered what was going on quickly and 25 brought proceedings quickly they might get a judgment</p> <p style="text-align: center;">Page 75</p>
<p>1 ratio is what? 2 MR GARDINER: The ratio, my Lord, is this. That a period of 3 interest running over a year is not of itself -- 4 LORD JUSTICE PATTEN: Right. 5 MR GARDINER: -- something that determines that you have 6 yearly interest. 7 LORD JUSTICE PATTEN: So merely that you forebear or you 8 allow the debt to remain outstanding for more than 9 a year, you don't call it in within that period, isn't 10 enough in itself to make the interest that is payable 11 over that period yearly interest. 12 MR GARDINER: I put it more simply in saying the mere fact 13 that you've calculated interest by reference to more 14 than a year does not establish that you've got yearly 15 interest, you need something more. 16 LORD JUSTICE PATTEN: Yes, but he doesn't in fact discuss 17 what that more is. 18 MR GARDINER: Well, he does in a negative sense when he says 19 what you have here is a forbearance, what you actually 20 need is an investment. He says that the position might 21 have been different had they gone out of their way to 22 treat it as an investment. It's ... yes, it's the 23 passage on page 889, it says: 24 "Whether or not the present case could have been 25 brought into line with the mortgage cases if it had been</p> <p style="text-align: center;">Page 74</p>	<p>1 within a year of the default ordering repayment of the 2 sum plus interest, but would that be yearly interest? 3 MR GARDINER: It might well be yearly interest. 4 LORD DAVID RICHARDS: Even if it was only a period of nine 5 months from -- how would that be yearly interest? 6 MR GARDINER: Well, it goes back to <i>Bebb v Bunny</i>. There is 7 no precise date saying it's definitely less than a year. 8 It could accrue over a period more than a year. It's 9 therefore capable of applying for than a year and 10 therefore it could well be yearly interest. 11 LORD DAVID RICHARDS: Well, the judgment couldn't apply for 12 more than a year. I mean the judgment is after 9 months 13 and is for £1 million plus interest over the 9 months. 14 MR GARDINER: Yes. 15 LORD DAVID RICHARDS: So I don't understand how it is 16 capable of going for more than year. 17 MR GARDINER: Yes, and in those circumstances I think, yes, 18 you would be back into a case of <i>Goslings & Sharpe</i> of 19 something which would be treated as a 9-month -- 20 LORD DAVID RICHARDS: Whereas if they've -- 21 MR GARDINER: -- situation. 22 LORD DAVID RICHARDS: -- if it's taken them 15 years or 23 several years to get to judgment -- 24 MR GARDINER: Yes. 25 LORD DAVID RICHARDS: -- then it is yearly.</p> <p style="text-align: center;">Page 76</p>

1 MR GARDINER: It may well be yearly.
 2 LORD DAVID RICHARDS: So in those circumstances you are just
 3 looking at the period, aren't you?
 4 MR GARDINER: I always accepted that one of the conditions
 5 for getting to yearly interest is you've got to have
 6 a period of sufficient length.
 7 LORD DAVID RICHARDS: But in those cases --
 8 MR GARDINER: That itself is not sufficient on its own.
 9 LORD DAVID RICHARDS: All right. Okay, thank you.
 10 LADY JUSTICE GLOSTER: What would you say to an argument
 11 that you can distinguish Gateshead on the basis that the
 12 correct analogy is with the compensation cases, and that
 13 one is not looking at the sort of situation in
 14 Gateshead, one is looking at a statutory scheme that
 15 introduces not equitable compensation but compensation
 16 imposed on the administrators and therefore one has to
 17 apply the analogy with the Regal Hastings-type of case?
 18 MR GARDINER: Well, my Lady, I wouldn't accept that that is
 19 a basis for distinguishing Gateshead for this reason.
 20 That when you start talking about compensation and
 21 interest you are, in a sense, I think, to some extent,
 22 on a slippery slope, because in a sense interest I mean
 23 is what you get for the use of money, so it's
 24 compensating you for having been out of your money for
 25 a period of time. It's a question of, as Mr Donovan put

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1 it in Riches, I mean is this creature something which
 2 can fall within the term "interest of money" or not? If
 3 the statute says it's interest or interest of money then
 4 that's what you've got to treat it as.
 5 LADY JUSTICE GLOSTER: Mm.
 6 MR GARDINER: I know we've just gone past 1 o'clock but
 7 I would quite like to finish. There is just one very
 8 little point that my learned friend reminded me of.
 9 LADY JUSTICE GLOSTER: Well no, we'll do that at
 10 two o'clock.
 11 How long are you going to be Mr Gammie?
 12 MR GARDINER: My Lady, I wouldn't have thought more than
 13 30 minutes.
 14 LADY JUSTICE GLOSTER: Fine. Thank you very much.
 15 (1.00 pm)
 16 (The short adjournment)
 17 (2.00 pm)
 18 LADY JUSTICE GLOSTER: Mr Gardiner, Lord Justice Patten has
 19 a comment he would like to put to you.
 20 LORD JUSTICE PATTEN: My Lady, yes. Just before we move
 21 away from the cases you have been looking at, could
 22 I ask for your help, Mr Gardiner, about -- I notice when
 23 we looking at Riches, if you go to page 406 in the
 24 report, there is Lord Simonds' speech. Just before
 25 halfway down where he starts saying "I come then to the

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1 second stage" -- no, I'm sorry, it is not there. It is
 2 in his speech, sorry, it is 410. He refers to the last
 3 paragraph on that page, he says:
 4 "It was further urged on behalf of the appellant the
 5 interests ordered to be paid by him is not interests of
 6 money, which is the main issue for the purpose of tax,
 7 because it had no existence until it was awarded [so it
 8 is a point we have been looking at] and did not have the
 9 quality of being recurrent or being capable of
 10 recurrence."
 11 And he said that argument was based on what
 12 Lord Maugham said in Moss' Empires as to the meaning of
 13 the word "annual".
 14 If we could we just stop there for the moment before
 15 we go on to what he then says about Moss' Empires,
 16 because we have Moss' Empires in the bundle, haven't we?
 17 MR GARDINER: We have, my Lord, yes.
 18 LORD JUSTICE PATTEN: At tab 13. And just looking at --
 19 I haven't had a chance to follow this right through by
 20 looking at the judgment, but if you look at the
 21 headnote --
 22 MR GARDINER: Of Moss' Empires, my Lord?
 23 LORD JUSTICE PATTEN: Of Moss' Empires at tab 13. What
 24 Lord Maugham said there was:
 25 "The word annual in the rule must be taken to have

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1 the quality of being recurrent or being capable of
 2 recurrence."
 3 Which is your point.
 4 MR GARDINER: Yes.
 5 LORD JUSTICE PATTEN: But the way that Lord Simonds deals
 6 with it in the context of the issue in Riches, if we can
 7 go back to 410, is to say:
 8 "It would be sufficient to say that we are here
 9 dealing with the words in the Income Tax Act which do
 10 not include either 'annual' or 'yearly', but in any case
 11 I do not understand why a sum which is calculated upon
 12 the footing that it accrues de die in diem has not the
 13 essential quality of recurrence in sufficient measure to
 14 bring it within the scope of income tax."
 15 So on one reading on that what he is saying is that
 16 even if it is right that the word "yearly" or "annual"
 17 requires the payment to have a quality of recurrence,
 18 you can find it in respect of a retrospective payment,
 19 provided you can say that it was calculated -- and these
 20 are my words "albeit retrospectively" -- on a de die in
 21 diem basis. In other words, there is a sort of deemed
 22 recurrence or accrual in much I think the same way that
 23 Viscount Simon described at page 398 where he talked
 24 about the accumulated fruit of the tree. I mean, it is
 25 the same basic notion.

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<p>1 Is there anything you want to say about these 2 passages? 3 MR GARDINER: Yes, my Lord. I put it this way: I jib at the 4 reference to "retrospective". I don't regard it as 5 being a statement by reference to a retrospective view. 6 I regard it that they are looking at the particular 7 animal. I mean, the interest in Riches did accrue from 8 day-to-day, de die in diem. The annual payments in 9 months empire did accrue de die in diem on a recurring 10 basis. 11 LORD JUSTICE PATTEN: Yes, may be they did, but I think he 12 is only picking up Moss' Empires by what is meant by the 13 word "annual". So what I was fastening on, the third 14 line of the passage at 410 in Riches, what he says is: 15 "The argument was that the interest couldn't be 16 interest of money because it had no existence until it 17 was awarded." 18 In other words, it didn't actually accrue from month 19 to month or year to year or from day-to-day, and 20 therefore didn't have the quality of recurrence which 21 Lord Maugham said it had to have to be an annual 22 payment. And he answers that point, which in a way is 23 your argument -- 24 MR GARDINER: Yes. 25 LORD JUSTICE PATTEN: -- by saying, well, provided it is</p> <p style="text-align: center;">Page 81</p>	<p>1 I think. 2 LORD JUSTICE PATTEN: We understand that argument. 3 LADY JUSTICE GLOSTER: Thank you. Lord Justice David 4 Richards also has a question. 5 LORD JUSTICE DAVID RICHARDS: Mr Gardiner, sorry to bombard 6 you with these things, but you rather lightly mentioned 7 I think this morning that if we didn't accept your 8 reading of Regal Hastings and -- I keep forgetting the 9 name of it. 10 MR GARDINER: Barlow, my Lord. 11 LORD JUSTICE DAVID RICHARDS: Thank you -- that you would 12 submit they were wrongly decided. But that is not 13 a submission that you have developed, so I am not quite 14 sure whether it is on the table or not and whether you 15 are going to develop it or not. 16 MR GARDINER: My Lord, I think it flows from the 17 observations I was making this morning in the sense that 18 we say it is those contentions set out in paragraph 34 19 of the judge's judgment, 1, 2 and 3, and I went on to 2 20 and 3 this morning. The first point is: to have yearly 21 interest, in our respectful submission, you have to have 22 an investment giving rise to accruals -- 23 LORD JUSTICE DAVID RICHARDS: No, I follow that. But you 24 really adopt -- or your predecessor gave 25 Mr Justice Hildyard the explanation which he accepts and</p> <p style="text-align: center;">Page 83</p>
<p>1 calculated on the footing it accrues de die in diem 2 that's enough. 3 MR GARDINER: I don't read that. I can see what 4 your Lordship says as far as the argument is concerned. 5 The argument was put on that basis in the earlier part 6 of the paragraph, but it seems to me as far as 7 Lord Simonds is concerned, he says: 8 "It would be sufficient to say that we are here 9 dealing with the words in the Income Tax Act which do 10 not include either 'annual' or 'yearly', but in any case 11 I do not understand why a sum which is calculated upon 12 the footing that it accrues de die in diem has not the 13 essential quality of recurrence in sufficient measure to 14 bring it within the scope of income tax." 15 I mean, I don't think he is putting any great 16 emphasis on the calculation. He is saying there is 17 interest there which is accruing de die in diem and that 18 is how you calculate it. 19 LORD JUSTICE PATTEN: All right. I just wanted to give you 20 the opportunity of saying whatever you wanted to say 21 about it. 22 MR GARDINER: My Lord, I am grateful. I don't think I can 23 say anything more than that other than we say the 24 interest in Riches did actually accrue de die in diem as 25 we say it did in Barlow and in -- it is the same point,</p> <p style="text-align: center;">Page 82</p>	<p>1 you support that. But nothing is decided but I just 2 would like to know if we consider that 3 Mr Justice Hildyard is wrong in the way he reconciles 4 those cases, what your position is on those cases. 5 MR GARDINER: Yes. Our position on those cases is twofold. 6 One is we say income accrued properly understood, 7 therefore they are consistent with our submissions. If 8 that's wrong and they were simply situations where there 9 was a retrospective determination of an amount of 10 interest payable, so in my terms the interest did not 11 accrue, and for that reason alone they were wrongly 12 decided. 13 LORD JUSTICE DAVID RICHARDS: And so should be overruled. 14 MR GARDINER: Yes. 15 LORD JUSTICE DAVID RICHARDS: Can I just raise this with 16 you: I am afraid I don't know the authorities on it but 17 I am reasonably confident that there is a principle of 18 statutory construction that where a provision in 19 a statute has been considered and construed by the 20 courts and Parliament reenacts that provision, then 21 Parliament is taken to reenact the provision in the 22 knowledge of the law, the court's construction, and that 23 that creates at any rate a rebuttable presumption -- 24 that is probably not quite the right language -- that 25 the reenacted provision is to bear the meaning given to</p> <p style="text-align: center;">Page 84</p>

<p>1 it in the earlier court decisions. 2 I am not sure if you are familiar with that 3 principle. As I say, I think it has been discussed in 4 a number of cases. But in overruling those cases, that 5 would involve a departure from that principle. Maybe 6 you say the principle doesn't exist, but I think there 7 is -- 8 MR GARDINER: With respect, I would say not because the 9 principle surely is applicable to what the courts in the 10 past have actually held yearly interest to be. And we 11 say in enacting section 874 and using the term "yearly 12 interest", Parliament was then using a term which was 13 a term of art which had been actually regarded and 14 looked at by the courts for 160/170 years. 15 LORD JUSTICE DAVID RICHARDS: Yes, but that would include 16 Barlow and Regal Hastings. 17 MR GARDINER: It would include the lot, yes. 18 LORD JUSTICE DAVID RICHARDS: So what I am putting to you 19 is: in those circumstances what approach should we take 20 to your alternative submission that we should overrule 21 those cases? 22 MR GARDINER: I think we should take the approach of looking 23 at the overwhelming amount of authority and especially 24 of authority in the higher courts. You have two 25 decisions of the Court of Appeal. You have Goslings and</p> <p style="text-align: center;">Page 85</p>	<p>1 LORD JUSTICE DAVID RICHARDS: This is at page? 2 MR GARDINER: I am sorry, it is page 11, my Lord, behind 3 tab 1, grounds of appeal, paragraph 5. It says: 4 "The judge wrongly held that interest does not 5 accrue ...(Reading to the words)... believe this view is 6 wrong." 7 I don't want to elaborate a great deal, but the same 8 point is followed up in the skeleton written by Mr Goy 9 at paragraph 6. Paragraph 5 of the skeleton sets out 10 the passage from Waterfall IIA, paragraph 149. It 11 doesn't underline the first four lines, et cetera, which 12 we think is a crucial part of it, and then comments: 13 "When your Lordship says that the statutory interest 14 is not a right to ...(Reading to the words)... but for 15 such contingency the right to interest would accrue due 16 from time to time." 17 I have made my point on that. That in our 18 submission is basically inconsistent with your 19 Lordship's judgment in paragraph 154 of Waterfall IIA. 20 I only just raise that because I am still frankly at 21 a loss as to what the Revenue's position as far as that 22 is concerned. 23 The very final point is this: I promised right at 24 the beginning of my submissions to take you to the 25 judge's judgment and I haven't done so. Can I just</p> <p style="text-align: center;">Page 87</p>
<p>1 you have Gateshead, and you have the one that is cited 2 by everyone, Bebb v Bunny as to what is the predominant, 3 perhaps I should say, force of those statutes in 4 construing the term yearly interest. 5 LORD JUSTICE DAVID RICHARDS: So this would be a case where 6 in the light of those authorities, notwithstanding the 7 principle of statutory construction and having regard to 8 it, nonetheless it would be appropriate to overrule 9 those two decisions? 10 MR GARDINER: Yes. I think as far as Barlow is concerned, 11 I mean Mr Justice Finlay obviously thought he was 12 following Bebb v Bunny. 13 LORD JUSTICE DAVID RICHARDS: Yes, we have your submissions 14 on it, yes. Thank you. 15 MR GARDINER: I only have two very, very brief points now. 16 One is this: I would quite like to know, and I know it 17 is at this late stage, what exactly is the position of 18 HMRC on this appeal as far as the decision of 19 my Lord Lord Justice David Richards in Waterfall IIA. 20 I didn't gather it from the points in opening, but we 21 haven't looked at the grounds of appeal -- perhaps we 22 ought to look at them. The grounds of appeal, 23 paragraph 5. It is obviously in the core bundle, the 24 first item. Paragraph 5, the grounds of appeal. That 25 says the judge, Mr Justice Hildyard here --</p> <p style="text-align: center;">Page 86</p>	<p>1 make -- I don't want to read it up because I am sure you 2 actually read it all and I'm sure there's nothing I want 3 to say about it particularly. But the guts of it is 4 paragraph 58 to 63, and I am not going to ask you to 5 read it again, but we do say the learned judge did get 6 this right. 7 You can see the significance he attached to the 8 Gateshead case in paragraph 59. You can also see the 9 significance he attached to Garston and making the 10 point: 11 "Emphasised the prerequisite of some form of 12 investment or loan intended by the parties to remain 13 outstanding and attract and accrue interest for a period 14 of more than a year." 15 He goes on: 16 "Accrual over the course of the loan or investment 17 is a requisite characteristic of a loan or investment. 18 ...(Reading to the words)... must be accrual of interest 19 over a tract of future time." 20 And I think my submissions yesterday and today have 21 been in conformity with that and I don't want to repeat 22 them. But we do say the learned judge here did consider 23 all these matters and he put it in those terms in his 24 judgment. And in our respectful submission for the 25 reasons I have given, we say he was right.</p> <p style="text-align: center;">Page 88</p>

1 LADY JUSTICE GLOSTER: Thank you very much.
 2 LORD JUSTICE DAVID RICHARDS: Mr Gardiner, one final point:
 3 I asked Mr Gammie about subsection 5A of the section.
 4 Are you able to enlighten us at all about that
 5 provision?
 6 MR GARDINER: My Lord, I should have looked it up, and he
 7 probably has. He's right in the sense of it was
 8 specifically brought in to deal with these claims in
 9 particular against banks by individuals, the PPI claims
 10 which I suspect even you get harried by them, and we do
 11 in chambers by people --
 12 LADY JUSTICE GLOSTER: But was there any definition of
 13 compensation anywhere?
 14 MR GARDINER: I don't think there was. I don't know whether
 15 my learned friend -- it is compensation paid to
 16 individuals. For example, it may not necessarily just
 17 be PPI. I was paid some compensation by a pension
 18 provider for not actually having dealt with my pension
 19 properly.
 20 LORD JUSTICE DAVID RICHARDS: Why it would not apply to the
 21 Regal Hastings case because that was equitable
 22 compensation?
 23 MR GARDINER: We would say it wasn't. It was interest on
 24 the payment for a breach of trust.
 25 LORD JUSTICE DAVID RICHARDS: Well, it is a payment of

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1 interest in respect of compensation, isn't it?
 2 MR GARDINER: Yes.
 3 LORD JUSTICE DAVID RICHARDS: So there might be argument --
 4 MR GARDINER: And these provisions have only been there
 5 I think for about four or five years -- 2013, yes.
 6 LORD JUSTICE DAVID RICHARDS: Yes.
 7 MR GARDINER: They were brought in specifically to deal with
 8 those claims in particular against the banks and
 9 insurance companies.
 10 LORD JUSTICE DAVID RICHARDS: In particular in respect to
 11 the banks, but the word "compensation" is a word of very
 12 wide meaning.
 13 MR GARDINER: My Lord, yes.
 14 LADY JUSTICE GLOSTER: It is interesting because it has been
 15 limited to an individual.
 16 MR GARDINER: Yes. My learned friend Mr Gammie was right in
 17 the sense of saying that most of the individuals are
 18 probably basic rate taxpayers and by adopting that
 19 approach it means they don't get forced into making
 20 a tax return.
 21 LADY JUSTICE GLOSTER: Yes.
 22 MR GARDINER: Because tax is deducted at the basic rate and
 23 if they were basic rate taxpayers then that absolves
 24 them of all liability.
 25 LORD JUSTICE DAVID RICHARDS: The interest of the provision

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1 perhaps lies principally in the words in brackets at the
 2 end of it "irrespective of the period in respect of
 3 which the interest is paid".
 4 MR GARDINER: Yes, because the point is that it could have
 5 been in respect of something that happened six, seven,
 6 eight, nine years ago.
 7 LORD JUSTICE DAVID RICHARDS: Or it could be something which
 8 happened only eight months ago.
 9 MR GARDINER: Yes.
 10 LORD JUSTICE DAVID RICHARDS: Which would not be early
 11 interest.
 12 MR GARDINER: That is right, and it is deeming in all
 13 circumstances --
 14 LORD JUSTICE DAVID RICHARDS: So it's deemed to be interest
 15 even though it is less than a year.
 16 MR GARDINER: Yes, that's right, my Lord.
 17 LORD JUSTICE DAVID RICHARDS: But it refers to yearly
 18 interest being payable in respect of a period. Anything
 19 do you want to say about that?
 20 MR GARDINER: I think they are looking at a period and they
 21 may be looking, as your Lordship puts it, in a period of
 22 only eight months or a period of a year and a half and
 23 saying regardless of what the period is, it shall be
 24 deemed to be yearly interest.
 25 LORD JUSTICE DAVID RICHARDS: But in respect of Mr Gammie's

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1 submissions as to the right construction of yearly
 2 interest, he says if the interest is payable in respect
 3 of a period which is more than a year, then it is yearly
 4 interest.
 5 MR GARDINER: I don't follow the logic of that, I am afraid.
 6 LORD JUSTICE DAVID RICHARDS: No, but it is the phrase that
 7 is used in this subsection. That is why I am raising it
 8 with you.
 9 MR GARDINER: As I see it, as I have always accepted in this
 10 case, to get to yearly interest, one part of the task is
 11 to actually find something capable of extending for more
 12 than a year. And I say there is another part of it;
 13 that is there has to be an accrual of income on an
 14 investment.
 15 If you have something which is capable of getting to
 16 more than a year and if the statute wants to deem a tax
 17 deductible procedure to apply to it, it has to deem it
 18 to be yearly interest even though it wasn't in respect
 19 of a year. And I don't, with respect, see any further
 20 logical inference to be drawn from that statutory
 21 provision about the constituents of yearly interest.
 22 LADY JUSTICE GLOSTER: Right. Yes, Mr Gammie.
 23 Reply submissions by MR GAMMIE
 24 MR GAMMIE: My Lady, just dealing with that last point.
 25 I have and I will be able to hand up at the end of my

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<p>1 submissions a couple of items in relation to that 2 particular provision in relation to compensation; that 3 what was said in the consultative document which 4 preceded the change in the law and then an annotated 5 version of the Finance Act 2013 which provides some 6 explanation. 7 I won't guarantee that they will answer 8 Lord Justice David Richards's questions but at least 9 they'll provide him with some more of the background on 10 why the provision was introduced. 11 LADY JUSTICE GLOSTER: And there is no definition of the 12 word "compensation". 13 MR GAMMIE: The consultative document obviously talks in 14 terms of the sort of compensation it is designed to deal 15 with. 16 LADY JUSTICE GLOSTER: No, but in the statute -- 17 MR GAMMIE: But in the statute there isn't, no. 18 My Lady, the surplus in this particular case, 19 according to the decision in Waterfall IIA, was first 20 identified as a possibility in early 2012 and it began 21 to be provided for in the contracts that were being 22 entered into between the administrators and certain of 23 the creditors from September 2012. That is recorded in 24 the Waterfall IIA decision. The final payment which 25 meant that a surplus had arisen was not</p> <p style="text-align: center;">Page 93</p>	<p>1 but there may not be any accrual. 2 My learned friend accepted that in his submissions 3 yesterday. His particular reference to that in the 4 light I think of questions that my Lady was putting to 5 him is at page 123 in the transcript. 6 So I do not begin to understand how one 7 distinguishes a situation where there may have been an 8 identifiable breach of trust. One doesn't know 9 precisely what the claim might be in respect of that 10 because, for example, the investments might have been 11 doing very well even though they were unauthorised and 12 only subsequently plummeted in value, and one doesn't 13 know for certain what the measure of the interest would 14 be as and when a breach of trust is established, claim 15 is made and reparation is ordered by the court. 16 As against that, we are looking at a situation where 17 there are creditors who have proved debts in the 18 administration. So there is a fund of money to which 19 they hope is going to be there from which they are going 20 to recoup some or all of their proved debts, and there 21 is a statutory entitlement to interest in respect of 22 that if the surplus emerges. It is merely a situation 23 where there is a conditional contingency that attaches 24 to whether or not interest will ultimately be paid. 25 I would have said that that was a more certain</p> <p style="text-align: center;">Page 95</p>
<p>1 until April 2014. 2 My learned friend started his submissions yesterday 3 by trying to explain in what circumstances and what 4 nature of right had to exist for there to be in his 5 conception an accrual. What I certainly don't 6 understand from what he said yesterday, and I merely 7 pose it now as an unanswered question may be in his 8 submissions, is whether or not he says that an accrual 9 starts from a point at which a surplus becomes apparent 10 but before -- 11 LADY JUSTICE GLOSTER: It is ascertained. 12 MR GAMMIE: -- it's ascertained. 13 LADY JUSTICE GLOSTER: Well, the quantum is ascertained, you 14 mean. 15 MR GAMMIE: You mean the quantum of the surplus is 16 ascertained? 17 LADY JUSTICE GLOSTER: Yes. 18 MR GAMMIE: That is correct. But at some point in the 19 process, as is merely my submission, before the surplus 20 is ascertained, it will frequently I would have thought 21 in these circumstances be apparent that there is 22 a surplus there. I do not begin to understand how one 23 distinguishes that type of scenario with the sort of 24 scenario we have been looking at in relation to Barlow 25 or Regal v Gulliver, where there is a breach of trust</p> <p style="text-align: center;">Page 94</p>	<p>1 position in relation to the type of considerations that 2 we have in mind in deciding whether or not there is 3 yearly interest than there is in cases such as Barlow or 4 Regal v Gulliver. As I say, I would submit that there 5 is no real substantive differentiation between the two 6 to say why one is yearly interest and the other is not. 7 In each case, one is looking to a point in time where 8 one can look back and calculate what the interest is 9 over a period of time. And that is precisely what my 10 learned friend Mr Goy put in the skeleton argument in 11 this particular case. 12 If we just look at exactly what it was he said in 13 the passages my learned friend alluded to. In 14 paragraph 2 of the skeleton argument, it says: 15 "In order for interest to be yearly interest as 16 opposed to other interest, it must have some quality 17 that links the interest to a period of a year or more. 18 In the appellant's submissions, such quality is nothing 19 more than that the interest when an unconditional 20 entitlement to it first arises must be payable in 21 respect of --" 22 LADY JUSTICE GLOSTER: Sorry, what paragraph are you looking 23 at? 24 MR GAMMIE: I am looking at paragraph 2, my Lady. It is in 25 the core bundle.</p> <p style="text-align: center;">Page 96</p>

<p>1 LADY JUSTICE GLOSTER: In the respondent's skeleton? 2 MR GAMMIE: No, in the appellant's skeleton, my Lady. So it 3 is in the core bundle at tab 2, page 19. 4 LADY JUSTICE GLOSTER: I have it. Yes. 5 MR GAMMIE: Again, in paragraph 3, having set out the 6 criteria that Mr Justice Hildyard relied upon in 7 reaching his decision on page 20 -- 8 LORD JUSTICE PATTEN: Can we just for a minute pause, 9 Mr Gammie, in relation to your paragraph 2. 10 MR GAMMIE: Of course, my Lord. 11 LORD JUSTICE PATTEN: "Must have some quality links interest 12 to a period of a year or more. That is nothing more 13 than the interest when an unconditional entitlement to 14 it arises must be payable in respect of a period or 15 a year or more." 16 So that's looking at it retrospectively, is it? 17 MR GAMMIE: Indeed, my Lord, and that is the key feature as 18 I said in my opening submissions. If you think about 19 Barlow, if you think about Regal v Gulliver, if you 20 think about our case, if you think about any breach of 21 trust, if you think about an award of damages under the 22 Senior Courts Act -- section 35A I think it is -- in 23 relation to a claim which is successful, you are looking 24 back to a period. 25 LORD JUSTICE PATTEN: But let's assume -- this is all in</p> <p style="text-align: center;">Page 97</p>	<p>1 you are applying a different test than you would apply, 2 for example, in relation to an ordinary bank deposit. 3 MR GAMMIE: But -- 4 LORD JUSTICE PATTEN: Sorry, just to make it clear what 5 I mean. I think you accept that this was -- vis à vis 6 the transcript Mr Gardiner showed us -- if you put money 7 in what was intended to be or what could be a very short 8 term arrangement, could come to an end quite quickly but 9 it happened to last for more than a year, that's not 10 enough to make it yearly interest. 11 MR GAMMIE: Because -- 12 LORD JUSTICE PATTEN: What I then ask is: why does it matter 13 that just because the statutory interest covers a period 14 of more than a year, why does that make it yearly 15 interest? 16 MR GAMMIE: My Lord, just to pick up -- my learned friend 17 referred you to a passage in the transcript yesterday 18 when I was talking about these things, but he didn't 19 refer you to how it followed on. I think at page 34 of 20 the transcript where I made the obvious point that of 21 course you could deposit money to a bank on the basis 22 that it was going to be outstanding for a year, and 23 therefore that would be in the time(?). But if I just 24 open a deposit account with a bank, the entitlement to 25 interest in respect of that deposit account is there on</p> <p style="text-align: center;">Page 99</p>
<p>1 your favour. Let's assume that the overall analysis is 2 right; in other words, you can't get round Barlow and 3 Regal by saying, well, although the payments are 4 recorded in a judgment, an order, they in fact simply 5 reflect a liability that existed over the whole period 6 so that there was a recurring accruing liability at the 7 relevant time. Assuming you are right about that -- but 8 so far as there needs to be recurrence there is a sort 9 of deemed recurrence in the way Lord Wright described in 10 Riches, don't you still have to even on that 11 hypothesis -- I mean, I think what you would say, see 12 your paragraph 2, is that all you need to do is look 13 back at the fact that the liability to pay the interest 14 covers more than a year, which looking back from the 15 date on which the interest comes to be payable, you can 16 obviously tell one way or another. 17 But is that enough or do you have to be able to say: 18 well, look, on the hypothesis that there is this sort of 19 notional recurrence through that period, you have not 20 merely to look back but you have to put yourself in the 21 position of being at the start of the relevant period 22 just as you would, for example, if money was being put 23 in a bank deposit and ask yourself whether the payment 24 of interest over that period was likely to last over an 25 extended period of at least a year. Because otherwise</p> <p style="text-align: center;">Page 98</p>	<p>1 the day on which I open it. One then asks the question: 2 looking forward, what is the nature of my deposit? If 3 it is a deposit which I can immediately withdraw next 4 week, you might well conclude that actually this is not 5 the sort of thing in respect of which yearly interest is 6 going to accrue, even though, as matters turn out, next 7 week I find actually I don't need that money so I'll 8 leave it on deposit again. 9 So you are having to ask the question at the start 10 there because at the point at which the -- certainly the 11 terms in which Mr Goy expressed it here -- unconditional 12 entitlement arises is at the point at which you make the 13 deposit, and you then have to ask yourself: what's the 14 nature of this deposit? 15 I should add that banks are a very bad example or 16 very difficult example in this area of the law. 17 LADY JUSTICE GLOSTER: Well, why -- because they are 18 a paradigm example of a three-month deposit, three-month 19 term deposit that I roll over, and I leave it there for 20 six months and I may be intending to take it out after 21 nine, but actually I decide I am going to roll it over 22 for 15 months, but my intention may change. 23 MR GAMMIE: Indeed. That is a matter of your decision. 24 LADY JUSTICE GLOSTER: Yes. 25 MR GAMMIE: But historically, if I can go into the history,</p> <p style="text-align: center;">Page 100</p>

<p>1 the object of the deduction at source rules is that if 2 I give you money, then when you pay me interest on that 3 money if it comes out of a taxed fund, you can deduct 4 and retain the interest. That's the whole basis of 5 Addington's system. In other words, I have given you 6 money which is adding to your ability to generate income 7 yourself. So long as you have a big enough taxed fund, 8 the Revenue is unconcerned about the arrangement between 9 the two of us because you will pay tax on your income 10 without any relief for the interest so far as the taxman 11 is concerned, but you will be entitled to deduct and 12 retain tax on the interest you pay me. 13 Interestingly, the point my learned friend makes 14 that it was over a period accruing due is a feature of 15 the deduction of source system. Because if you are 16 paying out of a taxed fund, the rate of tax at which you 17 can deduct and retain is set by the year in which the 18 payment becomes due, not the date when the payment is 19 made. Whereas if the payment is made out of an untaxed 20 fund, it is the rate of tax when the payment is made. 21 There is a fundamental distinction there. 22 So if, for example, in this year -- going back 23 hundred years or so -- if a payment this week I was 24 supposed to pay you interest but I don't actually pay it 25 to you until the next tax year, so long as I am paying</p> <p style="text-align: center;">Page 101</p>	<p>1 the bank is going to end up paying tax on its gross 2 income without any deduction for the interests it's 3 paying, which of course is not a very good system for 4 banks which make their profits by the differential 5 between interest paid and interest received. That is an 6 element of their computation of their banking trading 7 profits. 8 So there has always been this difficult interaction 9 between a financial institution such as a bank which is 10 calculating its profits under case 1 of schedule D and 11 the rules which apply for case 3 on interest, including 12 the rules for dealing with interest paid out of taxed 13 funds and interest paid out of untaxed funds. 14 My Lady, I will be able to hand up at the end, if 15 you wish it, I don't have to hand it up, what I have 16 copied out of Wheatcroft's 1962 version of his treaties 17 on income tax, surtax and profits tax. Unfortunately 18 I didn't anticipate this question which was raised this 19 morning about surtax so I didn't copy the parts about 20 surtax. But that I think is one of the best 21 descriptions of how the system worked before the 1969 22 changes. And if you think it will be of assistance to 23 you in considering your decision in this case, then it 24 provides you with a fairly comprehensive description of 25 how the system worked, and I can hand that up. As</p> <p style="text-align: center;">Page 103</p>
<p>1 out of a taxed fund, I deduct it at the rate of tax this 2 year. 3 LADY JUSTICE GLOSTER: What, the year of payment? 4 MR GAMMIE: No, the year in which the interest was due, not 5 the year of payment, because I am paying it out of my 6 taxed funds. 7 LADY JUSTICE GLOSTER: A tax fund being? 8 MR GAMMIE: A tax fund being the tax I am bearing on my 9 other income in this current year. 10 LADY JUSTICE GLOSTER: Yes. 11 MR GAMMIE: What one also has to remember in thinking about 12 this system is that income tax throughout the period 13 until 1973 is at a single rate because surtax is 14 separate from income tax and has different ways of 15 dealing with interest, it allows a deduction for 16 interest. 17 So what you are essentially talking about is if the 18 rate of interest changes between the two tax years, if 19 any issue arises on this at a single rate. 20 That is just background. This doesn't work very 21 well for banks and banks have always caused a problem 22 with this system. Because a banker, if you are working 23 on the basis that the person who is paying interest -- 24 so in this case the bank with whom you have deposited 25 your money -- cannot get a deduction for the interest,</p> <p style="text-align: center;">Page 102</p>	<p>1 I say, I have described it in very general terms in the 2 last few minutes. 3 LADY JUSTICE GLOSTER: It will help us because it will 4 explain? 5 MR GAMMIE: Insofar as my learned friend's submissions 6 depend significantly on the history, it will at least 7 give you a comprehensive understanding of how interest 8 was dealt with in the period leading up to the 9 introduction of corporation tax and the changes in 1969, 10 and in particular how the taxation at source system 11 worked. Because I think without that understanding -- 12 to take an example, my learned friend Ms Addy this 13 morning said to me, "The point you made in relation to 14 Riches yesterday about rule 19, surely it was accepted 15 in that case that it wasn't rule 19 that applied, it was 16 rule 21". So was I right to draw attention to what 17 Viscount Simon had said about rule 19? 18 LORD JUSTICE PATTEN: Rule 19 is the one which has annual 19 interest. 20 MR GAMMIE: Rule 19 deals solely with yearly interest. 21 LORD JUSTICE PATTEN: That's what I meant, yes. 22 MR GARDINER: That is the rule which enables somebody to pay 23 under deduction and retain the tax they have deducted. 24 LORD JUSTICE PATTEN: Yes. 25 MR GAMMIE: So it only applies to yearly interest.</p> <p style="text-align: center;">Page 104</p>

<p>1 I think if you go over the transcript of yesterday, 2 you will see I was quite clear that I was not saying 3 that Riches was deciding what was or wasn't yearly 4 interest. My only passing observation in relation to 5 what Viscount Simon says was that the respondents in 6 this case are in the position that they'll either have 7 to deduct and retain under rule 19 or they'll have to 8 deduct and account under rule 21.</p> <p>9 The only situation in which he could be thinking 10 about that is if he thought that this interest was 11 potentially yearly interest. Because if he thought that 12 the interest was non-yearly interest, rule 19 would be 13 irrelevant because rule 19 only applies to yearly 14 interest, but rule 21 applies to all interest. So if 15 you pay yearly interest and you do not have a taxed 16 fund, then you have to account for tax at source under 17 rule 21.</p> <p>18 LADY JUSTICE GLOSTER: What page are we? I have Riches. 19 MR Gammie: Riches is at tab 15 and it is the page 396, the 20 sidelined passage.</p> <p>21 My Lady, Riches is more important, if you like, in 22 relation to the passages that have been drawn attention 23 to later about what accrual may or may not mean, but 24 insofar as there is a passing observation 25 Viscount Simon, and he was certainly knowledgeable about</p> <p style="text-align: center;">Page 105</p>	<p>1 assuming -- I am afraid I haven't checked this point -- 2 even assuming that executors were not automatically 3 under an obligation to withhold, but I think probably 4 they could have relied and the fact if the estate had 5 got enough income it might have been taxed but I don't 6 think that matters.</p> <p>7 So my observation on Riches was just the passing one 8 that Viscount Simon must have been contemplating the 9 possibility, at least, that this would be yearly 10 interest because otherwise he wouldn't have needed to 11 say anything about rule 19 at all.</p> <p>12 LADY JUSTICE GLOSTER: Out of interest, you may not know, 13 and it probably doesn't matter, but what quantum of tax 14 are we talking about here? Are we talking in the 15 hundreds of thousands?</p> <p>16 MR Gammie: Well, I am not sure that anybody would 17 necessarily know that because for most the obligation to 18 withhold would probably arise for any payments that flow 19 abroad and of course that will then be subject to other 20 considerations, for example, whether the recipient is 21 entitled to claim under a treaty.</p> <p>22 LADY JUSTICE GLOSTER: Right, I see so it is -- 23 MR Gammie: Or for example under the European Interest and 24 Royalties Directive or something. That point will 25 apply.</p> <p style="text-align: center;">Page 107</p>
<p>1 these matters, when he says if the judgment is given is 2 interest of money, and he says if it is, ie if it is of 3 interest of money, "the respondents when paying the 4 judgment debt are entitled to deduct income tax on the 5 amount of this award of interest and the appellant must 6 allow such deduction upon receipt of the balance while 7 the respondents will retain what is deducted if he has 8 paid it out of profits or gains brought in to charge to 9 tax, rule 19."</p> <p>10 That can only refer to yearly interest. 11 Whereas as my learned friend perfectly appropriately 12 pointed out, it seems to have been well accepted that in 13 this case rule 21 applied but of course rule 21 applies 14 both to yearly and to other interest.</p> <p>15 LORD JUSTICE PATTEN: Yes. 16 MR Gammie: It is unsurprising that this was probably going 17 to be a payment of interest not out of a taxed fund 18 because of course I think the person -- this was 19 probably a payment -- well, it was a payment by the 20 bank, so it was a person by or through whom payment was 21 going to be made. So far as the source from which this 22 money had been derived I think the individual concerned 23 had died, so it was presumably his executors who were 24 involved and given the size of the sum involved I doubt 25 if they had a taxed fund large enough to cover it even</p> <p style="text-align: center;">Page 106</p>	<p>1 LADY JUSTICE GLOSTER: There is a lot of work to be done. 2 MR Gammie: So I assume there is still a lot of calculation 3 to be done, yes, my Lady.</p> <p>4 As I say, my principal submission in closing is, as 5 I say, that I fail to see a relevant distinction that 6 the principle that answers this, which is demonstrated 7 by Regal Hastings and other cases, is looking back once 8 the interest became unconditional you can see it is paid 9 for more than a year and is therefore yearly interest. 10 And it is of course paid in respect of a sum that was 11 outstanding, in other words, a proved debt that has 12 existed since the administration started or at least 13 under the rules for accruing in administration.</p> <p>14 The exceptions, if you like, that we have to the 15 rule, a lot of the cases are all looking forward which 16 I say gives of course the question a slightly different 17 characteristic but if I can comment briefly on some of 18 those.</p> <p>19 <i>Bebb v Bunny</i> of course tells us what is included but 20 it doesn't necessarily say that that is an exhaustive 21 definition of what is included. What we do know from 22 <i>Goslings & Sharpe</i> is that if you have something that can 23 be characterised as a short loan that is definitely out 24 but that is not, I say, what we are looking -- we can 25 see that we are not looking at something that is short</p> <p style="text-align: center;">Page 108</p>

<p>1 in the sense of less than a year here.</p> <p>2 In relation to banks, I have said something about</p> <p>3 that as to why they are unsatisfactory and indeed in</p> <p>4 relation to Gateshead that again is a case where you are</p> <p>5 looking forward. In fact, there are two features about</p> <p>6 Gateshead, one I alluded to but not quite in these</p> <p>7 terms. If you think about it in terms of the</p> <p>8 original -- because it is a 1914 decision so it is</p> <p>9 a decision that has been reached against a background of</p> <p>10 a system of deduction of tax at source which had been in</p> <p>11 place since 1842 or 1853 and which would have been very</p> <p>12 well familiar, the concept of paying out of a taxed fund</p> <p>13 doesn't look quite right if what you are looking at is</p> <p>14 expenditure incurred by a local authority which is</p> <p>15 entitled to claim a contribution from an owner of</p> <p>16 property because it is not that that owner of property</p> <p>17 has had any money lent to him or anything like that.</p> <p>18 That is why the Court of Appeal in that case certainly</p> <p>19 says what we are looking at on the facts is not a loan</p> <p>20 but of course the implicit in that is that if the facts</p> <p>21 had been different, they could have concluded it was</p> <p>22 yearly interest but, in any event, so what they were</p> <p>23 looking at was a situation where when the obligation to</p> <p>24 contribute by the individual landowner arose and the</p> <p>25 local authority was entitled to claim interest if he</p> <p style="text-align: center;">Page 109</p>	<p>1 of such debt being wholly uncertain, but rather as to</p> <p>2 the past. The past period in respect of which it is</p> <p>3 payable is certain and exceeds a year."</p> <p>4 That, my Lady, is precisely the argument that I hope</p> <p>5 I have expounded yesterday and today.</p> <p>6 LORD JUSTICE PATTEN: So that in the sort of situation you</p> <p>7 say we are in here you don't have to ask whether it has</p> <p>8 a prospect of continuance for a significant period,</p> <p>9 probably in excess of a year.</p> <p>10 MR GAMMIE: You know.</p> <p>11 LORD JUSTICE PATTEN: You just look at how long it has</p> <p>12 actually been paid for.</p> <p>13 MR GAMMIE: Indeed, you know. Because just as when the</p> <p>14 court awards damages and interest or a trustee is to</p> <p>15 make good his breach of trust together with interest you</p> <p>16 can look at that and you know that this is a period in</p> <p>17 respect of which more than a year has elapsed and that</p> <p>18 is the period for which you are compensating the</p> <p>19 beneficiary, in this case, the creditors, or in other</p> <p>20 cases the person who has been injured. You know that</p> <p>21 that is the period for which you are compensating and</p> <p>22 paying the interest in respect of that.</p> <p>23 LORD JUSTICE PATTEN: It is odd though, isn't it, that as</p> <p>24 the recipient of that interest you are in a worse</p> <p>25 position from a tax point of view than you would be if</p> <p style="text-align: center;">Page 111</p>
<p>1 didn't pay on their demand, at that point in time,</p> <p>2 looking forward, this was not something which was</p> <p>3 expected to go on. In fact it went on but it is merely</p> <p>4 illustrative of the point that the nature of the</p> <p>5 interest doesn't change just because it happens to run</p> <p>6 over the year if looking at it at the outset you can say</p> <p>7 this is not the type of thing that gives rise to yearly</p> <p>8 interest.</p> <p>9 It is dealt with by Mr Goy in the skeleton argument</p> <p>10 again at paragraph 14 which is on page 28 of the bundle</p> <p>11 and you will see there that he says:</p> <p>12 "It should be noted that it is not part of the</p> <p>13 appellant's case that where interest turns out to be</p> <p>14 payable in respect of a period of a year or more that</p> <p>15 such interest is automatically yearly interest. Such</p> <p>16 a claim would be inconsistent with the decision in</p> <p>17 Gateshead Corporation. In that case interest when paid</p> <p>18 was paid in respect of a period in excess of the year.</p> <p>19 Nevertheless, when the right to interest first arose it</p> <p>20 was payable in respect of a debt repayable on demand.</p> <p>21 In that case the character of the interest was</p> <p>22 determined as at the date the obligation to pay it first</p> <p>23 arose, just as in other cases. In the present case when</p> <p>24 the right to interest first arises it is not an</p> <p>25 obligation to pay interest as to the future, the period</p> <p style="text-align: center;">Page 110</p>	<p>1 you received interest over a period of more than a year</p> <p>2 under some deposit, for example, some arrangement that</p> <p>3 in fact could have terminated relatively shortly but in</p> <p>4 fact endured for more than a year.</p> <p>5 MR GAMMIE: I am not sure I quite understand how you're</p> <p>6 worse off, my Lord, other than in terms of cash.</p> <p>7 LORD JUSTICE PATTEN: Because you are not able on your</p> <p>8 argument to say to the Revenue, I know I have been paid</p> <p>9 interest for more than a year but I have been paid it</p> <p>10 under an arrangement or under a system which, depending</p> <p>11 on the length of the administration, might have lasted</p> <p>12 perhaps only six months that didn't have the same</p> <p>13 prospect of continuance or guarantee of continuance that</p> <p>14 ordinarily one would expect to find in these sort of</p> <p>15 arrangements for them to be yearly interest.</p> <p>16 MR GAMMIE: My Lord, but to the extent that you are entitled</p> <p>17 to interest, whether it is paid under deduction or</p> <p>18 whether it is paid gross, it is part of your taxable</p> <p>19 income. The only issue is in relation to persons</p> <p>20 outside the United Kingdom where in the absence of</p> <p>21 a double taxation agreement this country does not claim</p> <p>22 the tax in respect of short interest but it does claim</p> <p>23 the tax in respect of yearly interest, but it is</p> <p>24 still -- it is still income which is within the charge.</p> <p>25 LORD JUSTICE PATTEN: No, I see. Can I just be clear,</p> <p style="text-align: center;">Page 112</p>

<p>1 I don't know whether this is a convenient point to ask 2 you this, but I think Mr Goy in front of 3 Mr Justice Hildyard accepted that quite aside from 4 needing to cover a period of at least a year yearly 5 interest as a concept, if you like, under the statute 6 had to have the quality of recurrence. I mean, I am 7 getting this from what I think Mr Justice Hildyard 8 himself says in the paragraphs in his judgment that 9 Mr Gardiner was showing us before you started your 10 reply. Is that the Revenue's position, that you do 11 accept -- this is Lord Maugham's point that -- 12 MR GAMMIE: In relation to Moss' Empires or? His comment 13 on -- 14 LORD JUSTICE PATTEN: His interpretation of the phrase 15 "yearly interest" is that it has to have the quality of 16 recurrence, as he puts it I think. 17 MR GAMMIE: It has that quality I think it insofar as is 18 recognised in Riches, that it is treated as -- 19 LORD JUSTICE PATTEN: Yes, but you are not saying it doesn't 20 have to have the quality of recurrence. Riches just 21 simply explains even on a retrospective basis you can 22 treat it as having had that. 23 MR GAMMIE: It does. I think, and I am not sure my learned 24 friend necessarily expounded on this in a great sense, 25 I am not entirely clear as to what is meant by</p> <p style="text-align: center;">Page 113</p>	<p>1 recurrence for these purposes. 2 But I think recurrence -- I mean, what one is 3 talking about I think is the character of the payment 4 that is involved and certainly in Moss' Empires I think 5 that's what was being talked about because there one was 6 talking about an annual payment. So it had to be 7 something that had a quality of recurrence in the same 8 way that interest by being calculated over a period of 9 time or accruing over a period of time, however you like 10 to put it, has that quality of recurrence. 11 LADY JUSTICE GLOSTER: Yes. 12 MR GAMMIE: My Lady, unless I can help you further ... My 13 Lady, my learned friend Ms Addy has just pointed me to 14 something in response to your question about what is at 15 stake, yes, there is -- it is in the bundle B, 16 supplemental bundle. At tab 3 there is a witness 17 statement by Nicola Rass. 18 LADY JUSTICE GLOSTER: I am just interested that's all. 19 MR GAMMIE: And on page 21 of that bundle, page 6 of the 20 witness statement. 21 LADY JUSTICE GLOSTER: 1.2 billion risk to the Exchequer. 22 MR GAMMIE: I am asked to -- if you also turn on to tab 7 23 there is a second witness statement by the same lady on 24 page 51 of the bundle, page 5, internal -- 25 LORD JUSTICE PATTEN: Sorry, this is in the ...?</p> <p style="text-align: center;">Page 115</p>
<p>1 "recurrence" in this context in the sense that if 2 I borrow money for 15 months and at the end of 15 months 3 I repay that borrowing with interest and I have not made 4 any payment in the interim period the fact that I make 5 a single payment at the end doesn't deprive the interest 6 of its character of interest. So recurrence can't mean 7 that it has to contemplate more than one payment of 8 interest or something like that. Recurrence must mean 9 in terms of -- 10 LORD JUSTICE PATTEN: No, I had rather assumed I think what 11 Mr Gardiner has talked about accruals, that it has to 12 accrue from day-to-day or something of that kind. 13 MR GAMMIE: Indeed, and that would be an ordinary feature of 14 interest because interest being compensation for being 15 out of your money for a particular period of time, then 16 it is inherent in the character of interest as a type of 17 payment that it is calculated by reference to time and 18 a principal sum of money. 19 LADY JUSTICE GLOSTER: You say that retrospectively anyway 20 it is deemed to accrue. 21 MR GAMMIE: Yes, indeed. 22 LADY JUSTICE GLOSTER: And that is what the statute does. 23 MR GAMMIE: The fact of calculation, yes, indeed, my Lady. 24 I would say insofar as it has to have a character of 25 recurrence, whatever we mean by that, that is adequate</p> <p style="text-align: center;">Page 114</p>	<p>1 MR GAMMIE: Supplemental bundle B. 2 LADY JUSTICE GLOSTER: That has figures for the surplus and 3 for the potential risk to the Revenue. 4 LORD JUSTICE DAVID RICHARDS: Sorry, which tab did you say, 5 Mr Gammie? 6 MR GAMMIE: The other item I am referring to is -- 7 LORD JUSTICE DAVID RICHARDS: For the up-to-date figures. 8 MR GAMMIE: -- tab 7 of that bundle and it is page 51 of the 9 bundle after tab 7. 10 LORD JUSTICE DAVID RICHARDS: Yes. 11 LADY JUSTICE GLOSTER: That is a nice one for the secondary 12 market to feed into its consideration, isn't it? 13 MR GAMMIE: The final point I have been asked to make is 14 that obviously it is an evolving situation depending 15 upon the size of the surplus that eventually emerges. 16 LORD JUSTICE PATTEN: After the Supreme Court I would have 17 thought the surplus has probably doubled hasn't it? 18 LORD JUSTICE DAVID RICHARDS: I should have thought the 19 figure was capable of pretty exact calculation by now 20 because the administrators know what proved debts are, 21 leaving aside outstanding issues arising in ISDA 22 contracts and so on, but there are very substantial 23 proved debts. We know what the rate of interest is 24 and -- well a minimum rate would be 8 per cent per 25 annum, St Pauls in September 2008 and then the</p> <p style="text-align: center;">Page 116</p>

1 withholding tax is what? Is it now 20 per cent?
 2 MR GAMMIE: 20 per cent, yes.
 3 LORD JUSTICE DAVID RICHARDS: It would be a ballpark figure
 4 because it could well be more than that because there
 5 may be contracts on which there is a higher rate of
 6 interest than 8 per cent, I don't know. But, yes. So
 7 it is probably ...
 8 But set against that, as you have raised, I mean
 9 there is all the questions of double taxation and so on
 10 which are not fed into these figures at all. It all
 11 depends on the tax status of the recipients and all the
 12 rest of it and where they are and the regime that
 13 applies and so on.
 14 MR GAMMIE: Yes.
 15 LADY JUSTICE GLOSTER: Thank you very much indeed.
 16 LORD JUSTICE DAVID RICHARDS: Could I just ask, I asked
 17 Mr Gardiner about his alternative submission that this
 18 court should overrule Regal Hastings and the other
 19 decision, was there anything you wanted to say about
 20 that?
 21 MR GAMMIE: My Lord, I recognised I think the principle that
 22 you expounded about but I regret that I cannot
 23 immediately call to mind an authority on that point but
 24 I think that is certainly one of the ones that has been
 25 taken into account in these circumstances.

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1 LORD JUSTICE DAVID RICHARDS: Thank you.
 2 MR GAMMIE: My Lady, before you rise, I can hand up --
 3 I have --
 4 LADY JUSTICE GLOSTER: This is the potted history from
 5 Wheatcroft is it?
 6 MR GAMMIE: I can hand up three things. Two items in
 7 relation to the Finance Act 2013 and then, as I say, you
 8 may or may not find it of assistance but it is certainly
 9 not a text that is easily available unless you wish to
 10 borrow it from my room.
 11 LADY JUSTICE GLOSTER: No, I am afraid it's not. (Handed)
 12 I don't want to be ungrateful but the quality of the
 13 photocopy doesn't exactly encourage one to read it.
 14 MR GAMMIE: I apologise for that, my Lady. Unfortunately it
 15 is a book where the print on the other side of the page
 16 comes through because of the thinness of the page.
 17 LADY JUSTICE GLOSTER: If we are going to read anything at
 18 all, you would want us to read the sidelined passages
 19 would you?
 20 MR GAMMIE: Yes, I have sidelined what seem to me to be the
 21 most relevant. I can obviously see if I can get
 22 a better copy produced if you feel you would like it.
 23 LADY JUSTICE GLOSTER: If we need it we can always ask for
 24 it.
 25 MR GAMMIE: Yes.

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1 LORD JUSTICE PATTEN: Just remind me, Mr Gammie, why have we
 2 got -- you have handed up the annotated copy of the
 3 Finance Act and a consultation document. What are these
 4 relating to?
 5 MR GAMMIE: That was in relation to the addition of
 6 subsections 5A and B to section 874.
 7 LORD JUSTICE PATTEN: Okay.
 8 LADY JUSTICE GLOSTER: Yes.
 9 Thank you very much indeed. Thank you all very much
 10 including those behind you. We'll reserve our judgments
 11 in the usual way. The draft judgments will be
 12 circulated to the parties on a confidential basis for
 13 the purposes of typographical corrections or suggested
 14 typographical textual suggestions. It is not an
 15 opportunity to re-argue the case, as I am sure you are
 16 all aware. It is not necessary for the parties to
 17 attend the hand down but please try and agree the terms
 18 of any order. If you can't agree, the court will decide
 19 on the papers any outstanding consequential matters.
 20 Thank you very much indeed.
 21 (3.10 pm)
 22 (The hearing concluded)
 23
 24 Opening submissions by MR GARDINER 1
 25 (continued)
 Reply submissions by MR GAMMIE 92

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