IN THE COURT OF APPEAL
(CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

APPEAL NO. 2016/4109

NO. 7942 OF 2008

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

(1) ANTHONY VICTOR LOMAS
(2) STEVEN ANTHONY PEARSON
(3) PAUL DAVID COPLEY
(4) RUSSELL DOWNS
(5) JULIAN GUY PARR

Respondents

GROUNDS OF APPEAL

---

1. In order for interest to be "yearly interest" as opposed to other interest, it must have some quality that links the interest to a period of a year or more. In the High Court, the judge was wrong not to accept the Appellants' submission that the quality in question was nothing more than that the interest, when an unconditional entitlement to it first arises, must be payable in respect of a period of a year or more.

2. In the judge's view the interest in question was "sui generis" and very different from interest on contractual debts or the like. However, in spite of this the judge concluded that the interest would not be "yearly interest" on the basis that the interest lacked the characteristics of yearly interest as appear in cases concerning contractual debts and the like.

3. More particularly, he concluded that the interest lacked such characteristics of:

   (A) Accrual;

   (B) Recurrence;

   (C) an investment or loan.

4. The judge was wrong to consider that such characteristics must exist before interest can be yearly interest. In doing so the judge failed to identify the true criterion that must be satisfied before interest can be yearly interest - that there must be a link between the payment of interest and the period of a year or more. That link was not proved or disproved by the existence of the above characteristics identified by the judge.

5. The judge wrongly held that interest does not accrue, adopting the view of David Richards J in the Waterfall IIA application [2015] EWHC 2269 (see paragraph 9 of the judgment). The judge expressed the view that only payable contingently on the happening of an event or other satisfaction of a condition cannot be yearly interest. The Appellants believe that this view is wrong:

(A) Accrual of itself has nothing to do with a period of a year with which the distinction between yearly interest and other interest is on its terms concerned;

(B) the judge failed to explain why the contingent nature of a right to interest can somehow affect whether, when paid, it is yearly or not;

(C) There is no authority supporting the judge's view. The position is quite the contrary. In the cases of Barlow v CIR 21 TC 354, Regal Hastings v Gulliver (1944) ATC 297 and Jefford v Gee [1970] 2 QB 130, the courts concluded that interest was "yearly" despite none of the interest accruing in the strict sense referred to by the judge;

(D) If there is no accrual in the present case, it can only be because of the contingent nature of the entitlement to receive payment of the interest;

(E) In the High Court the Respondents made reference to earlier statutes which assumed, in cases where yearly interest was or could be subject to deduction of tax, that "yearly" interest was interest that accrued over a period (see paragraph 29 of the judgment). The judge was wrong

to take from this the assumption that yearly interest must accrue in the strict sense referred to; and

(F) There is no support for the judge's conclusion that an ordinary feature of both interest and yearly interest be converted into a requirement that must be satisfied.

6. The judge wrongly held that there is an absence of an element of recurrence to the interest sufficient to make it "yearly interest" (see paragraphs 61, 63 and 64 of the judgment). He was also wrong to distinguish the case of Riches v Westminster Bank [1947] AC 390 where it was argued that the interest payable in that case, being interest on a judgment debt, lacked the appropriate element of recurrence in order for it to be interest. He did so on the basis that that case was concerned with whether the payment was interest at all (see paragraph 64 of the judgment). The judge failed to recognise that the requirement for recurrence (which is a requirement before a payment can be interest) relates to the quality of the payment nothing further.

7. The judge stressed the distinction between Insolvency Rules 2.88(7) ("**Rule 2.88**") interest and that payable in respect of contractual debts and the like (see paragraph 57 of the judgment). He referred to the fact that there is "no loan; no investment; no judgment" (see paragraph 57 of the judgment). In doing so what the judge failed to explain is why the absence of a loan or investment etc. means that the additional requirement of interest being "yearly" before it can be "yearly interest" cannot be satisfied. The judge referred to cases which mentioned to the need for there to be some form of investment or loan (see paragraph 60 of the judgment). However, he made no specific mention of the views of Lord Donaldson MR on the issue which he expressed in Cairns v MacDiarmid [1983] STC 178 at page 181.

CONCLUSION

8. In conclusion the Appellants submit that the judge failed to identify the correct approach to be applied to determine whether or not the interest in question is yearly interest. Had he done so the only conclusion he could properly have come to would be to hold that it is.

9. The judge was also wrong to refer to "legislative intention" as indicating that the interest in question should not be yearly interest (see paragraph 73 of the judgment).

10. It appears that in coming to his conclusion, the judge was overly influenced by practical difficulties submitted by the Respondents that could arise if the Appellants are correct (see paragraphs 73 to 77 of the judgment). These practical considerations do not have any bearing on the meaning of yearly interest and it would be wrong to distort the meaning of "yearly interest" to deal with practical difficulties. It is for Parliament to regulate to avoid difficulties arising if it is so minded.

11. For the foregoing reasons, it is submitted that the Appellants' appeal should be allowed. The Rule 2.88 interest payable in this case should be held to be "yearly" interest for the purposes of section 874 of the Income Tax Act 2007.

IN THE COURT OF APPEAL **APPEAL NO.** 2016/4109

(CIVIL DIVISION)

ON APPEAL FROM

THE HIGH COURT OF JUSTICE **NO. 7942 OF 2008**

CHANCERY DIVISION

COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

(1) ANTHONY VICTOR LOMAS
(2) STEVEN ANTHONY PEARSON
(3) PAUL DAVID COPLEY
(4) RUSSELL DOWNS
(5) JULIAN GUY PARR

Respondents

GROUNDS OF APPEAL
