

<p>1 Friday, 29 April 2016</p> <p>2 (10.00 am)</p> <p>3 Submissions by MR GARDINER (continued)</p> <p>4 MR JUSTICE HILDYARD: Yes, Mr Gardiner.</p> <p>5 MR GARDINER: Good morning, my Lord.</p> <p>6 At the close of time yesterday evening, I was in the</p> <p>7 course of developing our argument by reference to our</p> <p>8 skeleton and I think I got to the end of paragraph 42.</p> <p>9 I have been dealing with the question of is interest</p> <p>10 under Rule 288(7), the interest. I had looked at the</p> <p>11 provisions of the rule and I had looked, in particular,</p> <p>12 at the decision and the reasoning of David Richards J in</p> <p>13 Waterfall IIA.</p> <p>14 So I would like then, to pick it up at paragraph 43</p> <p>15 onwards of our skeleton and, as I say, I am going to try</p> <p>16 to develop the rest of our argument by reference to that</p> <p>17 skeleton and the terms of it, in which we had the</p> <p>18 position of HMRC.</p> <p>19 Of course you will appreciate as far as paragraph 43</p> <p>20 is concerned, the only thing we had to go on at the time</p> <p>21 of drafting our skeleton was the Revenue's letter of</p> <p>22 2 March 2016. I apologise for this. If you look at</p> <p>23 footnote 12 and again footnote 14, we have given a wrong</p> <p>24 reference to it in the bundle. It should be, actually,</p> <p>25 in the core bundle item 5, rather than item 6. But</p> <p>Page 1</p>	<p>1 the words)... is calculated is the same as the period</p> <p>2 over which it accrues. In relation to the ...(Reading</p> <p>3 to the words)... any interest only arises after the</p> <p>4 debts have been paid."</p> <p>5 That's in summary terms, what we say Mr Justice</p> <p>6 David Richard decided. And we try at 46, to pin down,</p> <p>7 really, what is the Revenue's position as to that</p> <p>8 because in that letter of 2 March, and we've quoted it,</p> <p>9 they say in that letter -- they say:</p> <p>10 "The right to such interest accrues in every case."</p> <p>11 So they're looking at our case of statutory</p> <p>12 interest. They say that:</p> <p>13 "The right to such interest accrues in every case</p> <p>14 but it is only payable if there is a surplus in the</p> <p>15 administration, after all the other claims have been</p> <p>16 satisfied."</p> <p>17 We've emphasised the first few words "the right to</p> <p>18 such interest accrues in every case". We say this</p> <p>19 proposition is directly contradicted by paragraph 104 of</p> <p>20 David Richards J's judgment. I showed you -- I think it</p> <p>21 was the last thing I showed your Lordship at the close</p> <p>22 of play yesterday evening. You will remember Mr Dicker</p> <p>23 made various submissions that the judge refers to in</p> <p>24 paragraph 154, that he says "Well, it accrues and it is</p> <p>25 contingent on the determination of the surplus but it</p> <p>Page 3</p>
<p>1 I think it was plain that your Lordship indicated</p> <p>2 yesterday, you had actually looked at that letter</p> <p>3 anyway.</p> <p>4 MR JUSTICE HILDYARD: Yes.</p> <p>5 MR GARDINER: I don't therefore propose to read it.</p> <p>6 We say in 44 -- we say neither of those two</p> <p>7 arguments which we've summarised, the first being that</p> <p>8 the matter should be determined entirely by the period</p> <p>9 of calculation and the second alternative argument that</p> <p>10 the matter should be determined by looking at the</p> <p>11 position at the time that the administration was</p> <p>12 commenced.</p> <p>13 I think your Lordship will have appreciated, if</p> <p>14 you're looking at my learned friend's skeleton argument,</p> <p>15 they now have two alternative arguments, one being a new</p> <p>16 one, but I will come back to that later.</p> <p>17 But anyway, dealing with the first one, the</p> <p>18 calculation period, first of all, we say in 45, in</p> <p>19 particular, that:</p> <p>20 "In each case, the Revenue failed to consider</p> <p>21 whether statutory interest has the essential qualities</p> <p>22 of yearly interest."</p> <p>23 That's the point I was on about yesterday:</p> <p>24 "They wrongly assimilate interest paid under 288(7)</p> <p>25 to interest paid in other contexts where ...(Reading to</p> <p>Page 2</p>	<p>1 accrues if you look at it retrospectively", et cetera,</p> <p>2 et cetera, and he says it accrues and the judge quite</p> <p>3 positively rejected that in paragraph 154 of his</p> <p>4 judgment. It is tab 47 and perhaps if one just reminds</p> <p>5 you -- because I think it is actually quite important,</p> <p>6 because as we see it, my learned friend's skeleton</p> <p>7 argument is saying something very similar to what is</p> <p>8 said in their letter of 2 March, in paragraph 7 of their</p> <p>9 skeleton argument.</p> <p>10 As we understand what they are saying, they are</p> <p>11 saying in paragraph 70 of their skeleton, they say:</p> <p>12 "David Richard J says that the statutory interest is</p> <p>13 not a right to the payment of interest which they</p> <p>14 emphasise accruing due from time to time."</p> <p>15 They say:</p> <p>16 "It can only mean that the right to any payment of</p> <p>17 such interest is contingent upon a surplus remaining</p> <p>18 after payment of the proved debts and the extent of that</p> <p>19 surplus. But for such a contingency, the right to</p> <p>20 interest would accrue due over time."</p> <p>21 We say that is actually very similar to what</p> <p>22 Mr Dicker was arguing in Waterfall IIA and with respect,</p> <p>23 of course, is rejected in paragraph 154 of</p> <p>24 David Richards J's judgment.</p> <p>25 One can see four or five lines down on 154, the</p> <p>Page 4</p>

<p>1 argument, the contention of Mr Dicker:</p> <p>2 "The statutory right to interest arising under</p> <p>3 Rule 288 can be regarded, with hindsight, as having</p> <p>4 accrued on a day to day basis since the commencement of</p> <p>5 the insolvency process, albeit contingently on there</p> <p>6 being, ultimately, a surplus."</p> <p>7 So they are saying it accrues contingently on there</p> <p>8 ultimately being a surplus:</p> <p>9 "Whilst the event occurs, the right to interest is</p> <p>10 treated as having accrued during the relevant period."</p> <p>11 And then he says:</p> <p>12 "I do not accept this submission."</p> <p>13 And gives his reasons for it.</p> <p>14 So as I said in opening, we say that the other side</p> <p>15 don't accept, as it were, the rigour of</p> <p>16 David Richards J's judgment.</p> <p>17 So if I can go on again to our skeleton in</p> <p>18 elaboration of our response to the Revenue's primary</p> <p>19 argument. I am going to be relatively speedy, I hope,</p> <p>20 as far as this, because I think it is plain from what</p> <p>21 your Lordship said yesterday, you obviously read our</p> <p>22 skeleton and there's not much point in me just simply</p> <p>23 repeating it.</p> <p>24 But paragraph 47, the first argument is the</p> <p>25 calculation argument and as we say, the Revenue</p> <p style="text-align: center;">Page 5</p>	<p>1 rule, not deriving itself, from any of the authorities.</p> <p>2 You have to disregard all the law of 200 years. You</p> <p>3 have to invent a new rule today, for the purpose of</p> <p>4 achieving the result that they want, and there is</p> <p>5 absolutely no authority and no basis in the law for that</p> <p>6 proposition. The proposition has the benefit, no doubt,</p> <p>7 of my learned friend, Mr Goy's, argument but nothing</p> <p>8 more. No authority for it whatsoever.</p> <p>9 As we say, if one understands the authorities, there</p> <p>10 are clear authorities which are fundamentally against</p> <p>11 it, and I made my points yesterday that --</p> <p>12 MR JUSTICE HILDYARD: They say there is the contractual</p> <p>13 authorities. They say that the compensation authorities</p> <p>14 are different, in that there is no basis for</p> <p>15 distinguishing the statutory interest from those</p> <p>16 compensation authorities.</p> <p>17 MR GARDINER: I don't understand what are the compensation</p> <p>18 authorities they are relying on.</p> <p>19 MR JUSTICE HILDYARD: You say that, actually, when you get</p> <p>20 down to brass tacks, there have been one or two</p> <p>21 indications, possibly in, I think it was re Cooper -- is</p> <p>22 it? I can't remember. But you say that wiser heads in</p> <p>23 the Court of Appeal expressly disclaimed any decision.</p> <p>24 MR GOY: That's right. The only authorities that come</p> <p>25 anywhere near the non-contractual situation, there is</p> <p style="text-align: center;">Page 7</p>
<p>1 suggested if it's a year or longer, then the statutory</p> <p>2 interest should be regarded as yearly interest.</p> <p>3 We say in 48:</p> <p>4 "Mere quantification by reference to a period of</p> <p>5 a year or more, does not make a payment yearly or</p> <p>6 annual. It doesn't even make it interest."</p> <p>7 We give an example which perhaps just illustrates</p> <p>8 the fact that anything calculated by reference to</p> <p>9 a period of 12 years doesn't really establish anything</p> <p>10 at all.</p> <p>11 That's why we draw emphasis on that.</p> <p>12 Then we make the point in paragraph 49 that the</p> <p>13 whole emphasis on all the authorities I have referred to</p> <p>14 would be completely different if the matter were to be</p> <p>15 determined simply by reference to a calculation period.</p> <p>16 There is nothing in the authorities that gives rise to</p> <p>17 the proposition that this could be determined by</p> <p>18 reference to a calculation period.</p> <p>19 With respect, all the other side really have to say</p> <p>20 on this is "Ah, well, statutory interest hasn't</p> <p>21 necessarily been considered by any of the authorities</p> <p>22 hitherto. The authorities hitherto have been looking at</p> <p>23 contractual situations or judgment dates", or whatever,</p> <p>24 et cetera". This is, as it were, they're saying, a</p> <p>25 unique situation, and therefore you have to invent a new</p> <p style="text-align: center;">Page 6</p>	<p>1 the judgment debt in Cooper, there is the situation in</p> <p>2 Gateshead v Lumsden. There are indications and I mean</p> <p>3 the latter being very, very forceful authority, in our</p> <p>4 respectful submission, of a situation where something</p> <p>5 arose, unintended apparently, on the basis of</p> <p>6 Lord Sumner's judgment but something arose which is not</p> <p>7 dissimilar from our situation. One can see the</p> <p>8 principles that he applied in that particular case, on</p> <p>9 the basis that this was not something intended by the</p> <p>10 legislation to constitute yearly interest, not intended</p> <p>11 to produce the kind of investment yielding income over a</p> <p>12 period of time and even though it was calculated by</p> <p>13 reference to interest over many years, it was not yearly</p> <p>14 interest.</p> <p>15 That is, as I said in opening, I don't really want</p> <p>16 to repeat it, in our respectful submission, is the one</p> <p>17 authority in this case that one can point to which is</p> <p>18 fundamentally against the argument on the other side and</p> <p>19 it is a clear decision of the Court of Appeal.</p> <p>20 Then we make our point in paragraph 50 about the</p> <p>21 contractual situations and that this point is generally</p> <p>22 determinable, that's the middle of paragraph 50, at the</p> <p>23 outset, unless there is some definite change in</p> <p>24 circumstance. That's actually quite an important point</p> <p>25 to understand, because we're concerned with tax</p> <p style="text-align: center;">Page 8</p>

<p>1 deduction at source and by and large, as one can see 2 starting in 1803, they were talking about interest 3 payable yearly, half-yearly or in any other intervals or 4 whatever. You need to know, in those circumstances, 5 whether you are going to deduct tax on making those 6 payments at the outset. It is not something that you 7 can actually determine in a year's time, having gone 8 through a situation where you've been paying interest, 9 for example, on a number of occasions.</p> <p>10 You may have a situation where you have a liability 11 that arises or whatever and you have to pay interest 12 quarterly.</p> <p>13 You pay a payment quarterly, you don't pay another 14 payment after six months. You've got to know for the 15 first payment, whether you've got something which 16 constitutes yearly interest or not, and that can't 17 change. If you get to a point where suddenly you run 18 over a year and then "Ah, because the calculation period 19 is now over a year", you've now got yearly interest.</p> <p>20 That's a point which we make in paragraph 51 of our 21 skeleton and it is really quite an important point in 22 relation to statutory interest.</p> <p>23 If one thinks about the number of possible 24 permutations, one can imagine this kind of situation of 25 two almost identical debts put up for proof in the</p> <p style="text-align: center;">Page 9</p>	<p>1 established. That is not the kind of creature intended 2 by the legislation to create yearly interest.</p> <p>3 It is a point that we perhaps haven't made in the 4 skeleton expressly but one can also take on board the 5 fact that when Parliament enacted these provisions, one 6 has to look it, did Parliament enact anything in the 7 statutory provisions that would indicate an intention 8 that this should be yearly interest?</p> <p>9 Now, we say, following David Richards J, the answer 10 to that is "no" because Parliament expressly made it 11 a situation whereby the interest was only payable on the 12 recognition of a surplus. So it only arose at 13 a particular point of time. It expressly went out of 14 its way to say "This interest does not accrue during the 15 administration". It is the point I made yesterday by 16 reference to Rule 288(1) and (2), contra Rule 288(7). 17 that's the first point. Also your Lordship will be 18 perfectly well aware that the general principle that 19 Parliament enacted as far as these administrations were 20 concerned, was assuming that administrations would not 21 take longer than a year.</p> <p>22 That's the basic, standard procedure for an 23 administration.</p> <p>24 This is, all right, a very exceptional 25 administration but it only arises because the joint</p> <p style="text-align: center;">Page 11</p>
<p>1 administration early on. One, either because of the 2 speed and ability of the joint administrators, is dealt 3 with quickly, the other one less quickly and it may be 4 the other one is dealt with less quickly because an item 5 of evidence hasn't been submitted with it. But 6 essentially the nature of the debts are identical. The 7 first one is proved, determined, fairly quickly and is 8 actually paid off fairly quickly. Paid off within 9 a year. As we understand the argument on the other 10 side, that would not constitute yearly interest.</p> <p>11 The other one, either because the joint 12 administrators, no doubt other than those instructing 13 me, are dilatory and it isn't actually dealt with quite 14 so quickly, or there is some sort of possible problem 15 about its evidence and all the rest of it, and is 16 actually paid off after 13 months. That, apparently, on 17 the argument on the other side, is yearly interest.</p> <p>18 Now, that could never have been intended by any of 19 the authorities that we've looked at, as being the 20 concept but it gives rise to that kind of anomaly. We 21 could go into umpteen different anomalies if we wanted 22 to, as far as that is concerned but it does point out 23 the fact that what is happening here is a process of 24 administration. In consequence of the moratorium, 25 interest might become payable if a surplus is</p> <p style="text-align: center;">Page 10</p>	<p>1 administrators have to go off to the court and they have 2 to get permission to actually extend the period, which 3 of course, they've done.</p> <p>4 But if one looks at the statutory scheme and it's 5 the statutory scheme that creates the interest, is there 6 anything, one has to ask oneself, in that statutory 7 scheme that suggests for one moment that Parliament 8 considered that what it was enacting was a regime for 9 the payment of yearly interest?</p> <p>10 The answer, in my respectful submission, to that 11 question, definitely is, there is absolutely nothing in 12 the legislation to suggest anything of the sort.</p> <p>13 MR JUSTICE HILDYARD: You say that it isn't a right, subject 14 to contingency. They say it is. You say that the right 15 only arises at the time, if it ever arises, at the time 16 when the surplus is disclosed.</p> <p>17 MR GARDINER: Yes.</p> <p>18 MR JUSTICE HILDYARD: And at that time there's a measurement 19 of the entitlement by reference to time, which is why 20 you don't dispute it being interest.</p> <p>21 MR GARDINER: Yes.</p> <p>22 MR JUSTICE HILDYARD: In a way that's the sort of fault line 23 between you, isn't it?</p> <p>24 MR GARDINER: My Lord, yes, I accept that entirely. That is 25 an accurate statement, as you put it, of the fault line</p> <p style="text-align: center;">Page 12</p>

<p>1 between us. We accept it is interest but we say it is</p> <p>2 not yearly interest.</p> <p>3 That, of course, is the point. In all those</p> <p>4 authorities I referred to yesterday afternoon, that's</p> <p>5 what they were concerned with.</p> <p>6 MR JUSTICE HILDYARD: But you would say that's why</p> <p>7 David Richards J says what he says at paragraph 154,</p> <p>8 whatever it is.</p> <p>9 MR GARDINER: Yes.</p> <p>10 MR JUSTICE HILDYARD: Because he is looking at it, not as</p> <p>11 a right which the creditors had ab initio and which</p> <p>12 accrued subject to satisfaction of a condition or</p> <p>13 contingency but a right which is conferred if and when a</p> <p>14 surplus arises, conferred by statute, and measured as</p> <p>15 a matter of fact, by an interest rate prescribed by the</p> <p>16 Judgments Act over the course of time.</p> <p>17 MR GARDINER: Yes. There is part of a calculation that is</p> <p>18 by reference to that calculation period, but that is</p> <p>19 something that only arises if a surplus arises</p> <p>20 and therefore it is a calculation at that moment of</p> <p>21 time.</p> <p>22 MR JUSTICE HILDYARD: So you say it's not like a contractual</p> <p>23 right to be paid interest out of profit because that is</p> <p>24 subject to conditionality of profit?</p> <p>25 MR GARDINER: Yes.</p> <p style="text-align: center;">Page 13</p>	<p>1 the LBIE case.</p> <p>2 MR GARDINER: And he answered it not by reference to any tax</p> <p>3 issues or anything of that nature, but by reference to</p> <p>4 what he regarded as the force of the statutory</p> <p>5 provisions, what --</p> <p>6 MR JUSTICE HILDYARD: But he said it was a complete code --</p> <p>7 MR GARDINER: Yes.</p> <p>8 MR JUSTICE HILDYARD: -- in effect, and that therefore none</p> <p>9 of the rules of the common law or equity applied because</p> <p>10 statute had said "It only arises after you've paid off</p> <p>11 capital, so that ordinary financial advantages of paying</p> <p>12 off interest first, so your tree continues to generate</p> <p>13 fruit, don't apply".</p> <p>14 MR GARDINER: Yes. And that is the force of it. That may</p> <p>15 well be why it is such a special situation.</p> <p>16 MR JUSTICE HILDYARD: Yes.</p> <p>17 MR GARDINER: My Lord, I am grateful for that. That's</p> <p>18 helpful.</p> <p>19 What I wanted to go on to, then, was to say first of</p> <p>20 all, there is nothing in the statute that supports the</p> <p>21 argument on the other side.</p> <p>22 Then the next point I wanted to make was there's</p> <p>23 nothing in any of the authorities that supports the</p> <p>24 argument on the other side. That's what we go on to in</p> <p>25 paragraph 52 of the skeleton.</p> <p style="text-align: center;">Page 15</p>
<p>1 MR JUSTICE HILDYARD: It is really a matter of</p> <p>2 characterisation.</p> <p>3 MR GARDINER: Yes. I accept that entirely, my Lord, yes.</p> <p>4 That, put very briefly, is perhaps more succinctly what</p> <p>5 I have been arguing about all yesterday afternoon, yes.</p> <p>6 So I had got to the stage of saying there is nothing</p> <p>7 in the statute. I am obviously here, just dealing in</p> <p>8 a sense, with the response to the argument as we</p> <p>9 understand, on the other side. But there is nothing in</p> <p>10 the statute that supports it, we say, and that's clear</p> <p>11 from the statutory provisions but even clearer because</p> <p>12 of the judgment in Waterfall IIA.</p> <p>13 MR JUSTICE HILDYARD: In a way, what the Revenue, through Mr</p> <p>14 (Inaudible), have to demonstrate is that it isn't</p> <p>15 an issue of characterisation and/or that the</p> <p>16 characterisation adopted by David Richards J was wrong.</p> <p>17 MR GARDINER: Yes.</p> <p>18 MR JUSTICE HILDYARD: It is not binding on me --</p> <p>19 MR GARDINER: No.</p> <p>20 MR JUSTICE HILDYARD: -- and it is subject to appeal, but</p> <p>21 I think I should confess that I would need pretty clear</p> <p>22 persuasion that it was wrong. The authorities are</p> <p>23 interesting and the historical genesis is interesting</p> <p>24 but to some extent, it comes up to the question of</p> <p>25 characterisation which you say was asked and answered in</p> <p style="text-align: center;">Page 14</p>	<p>1 Your Lordship will remember in the letter of</p> <p>2 2 March, which again is all we had to go on at the time</p> <p>3 of drafting the skeleton, the only authority that the</p> <p>4 Revenue referred to at that stage -- they refer in their</p> <p>5 skeleton, to two other cases but I will come to that,</p> <p>6 perhaps, in a moment -- but they referred in the letter,</p> <p>7 to the case of Jefford v Gee. Perhaps I will just</p> <p>8 whistle through what we say about that and then take</p> <p>9 your Lordship to Jefford v Gee, because as we shall</p> <p>10 demonstrate, Jefford v Gee doesn't actually help,</p> <p>11 frankly, in any direction whatsoever.</p> <p>12 We say the case doesn't assist them. Contrary to</p> <p>13 what they suggest, the position in relation to damages</p> <p>14 has never been clearly determined. I referred already</p> <p>15 to Cooper, which is the judgment debt situation, and</p> <p>16 what Lord Cozens-Hardy, the Master of the Rolls, said in</p> <p>17 that particular case and Buckley LJ certainly said that</p> <p>18 he wasn't dissenting from anything that he said and</p> <p>19 Lawrence J agreed with him. He said, "Well, this is</p> <p>20 a judgment debt and really for that reason, it can't be</p> <p>21 yearly interest."</p> <p>22 So there is the first point, that relating to</p> <p>23 damages has never been clearly determined and we refer</p> <p>24 to re Cooper. And then we say:</p> <p>25 "Jefford v Gee itself was a personal injury case.</p> <p style="text-align: center;">Page 16</p>

<p>1 The tax position in relation to ...(Reading to the 2 words)... to be very complicated and does not appear to 3 have been the subject of detailed argument."</p> <p>4 Lord Denning referred in passing, at that particular 5 passage, to: 6 "The interest being taxable because it was yearly 7 interest."</p> <p>8 He noted <i>Riches v Westminster Bank</i>, which I just 9 notice very quickly before I go to <i>Jefford v Gee</i>: 10 "However, <i>Riches v Westminster Bank</i> concerned 11 a mandatory rule that applied to any kind of interest." 12 Not yearly interest, any kind of interest. That's 13 actually quite important, because they misunderstand 14 that in <i>Jefford v Gee</i>: 15 "Moreover, leaving aside the deduction rules, any 16 kind of interest would still have been chargeable to tax 17 within case 3 of schedule D." 18 The point I made yesterday and, again, it is of some 19 importance. Then furthermore at 149D to F, Lord Denning 20 wisely refused to become embroiled in this issue, 21 saying: 22 "There are special statutory provisions about 23 deducting tax ...(Reading to the words)... should be 24 computed and awarded as a gross sum payable to the 25 defendant, leaving him to work out whether he should</p> <p style="text-align: right;">Page 17</p>	<p>1 determination in this case, of the distinction between 2 yearly interest and any other interest, it is simply 3 a case on interest.</p> <p>4 As I said at the outset, and we've made plain 5 throughout this case, we accept that because Parliament 6 enacted this as interest, it is interest. There is no 7 dispute as to that. The dispute is it is not yearly 8 interest.</p> <p>9 Therefore, this case is actually of no assistance on 10 our point because it is on a point that is not in issue 11 here. We concede that the interest here, statutory 12 interest is interest. The case actually therefore is of 13 no assistance.</p> <p>14 The argument in the case, you can see it, I am not 15 going to go into it, at page 392, Mr Grant and 16 Mr Mustoe -- they are saying it is not interest all, it 17 is damages. It is compensation, it doesn't constitute 18 interest. That's the whole point of the argument in 19 this particular case and one can see Viscount Simon at 20 page 396, you can see, at the beginning of his judgment, 21 just the first substantial break on that page, 396: 22 "My Lords, the question which the House has to 23 decide has not, it seems, come preciously before the 24 courts. It is whether a sum of money ...(Reading to the 25 words)... of the Law Reform (Miscellaneous Provisions)</p> <p style="text-align: right;">Page 19</p>
<p>1 deduct tax or not."</p> <p>2 So I think perhaps the best thing for me to do would 3 be just to look, very briefly, at <i>Riches v Westminster</i> 4 <i>Bank</i>, which is in tab 42, because there is clearly 5 a misunderstanding of this, at least in the submissions 6 of behalf of the plaintiff appellant in <i>Jefford v Gee</i>. 7 But tab 42, just reading the headnote, one can see, 8 it is a case that went to the House of Lords. But the 9 very short headnote: 10 "A sum of money awarded ...(Reading to the words)... 11 as interest and including the sale ...(Reading to the 12 words)... is ..." 13 Just note there the words: 14 "... interest of money within the meaning of 15 Schedule D of the Income Tax Act 1918, so that the 16 judgment debtor when paying the judgment debt is 17 entitled to deduct income tax on the amount of the award 18 of interest and the judgment creditor must allow such 19 deduction on receipt of the balance." 20 So that's a situation where, as far as that case is 21 concerned, Rule 21 of the 1918 Act applied, so it was 22 interest for money, i.e. encompassed all kinds of 23 interest, yearly and any other interest. It encompassed 24 all kinds of interest, and there was no issue in this 25 case. There is no issue in this case, there is no</p> <p style="text-align: right;">Page 18</p>	<p>1 Act 1934 as interest and included in the total sum for 2 which judgment is given ..."</p> <p>3 This was a case where they were giving judgment on 4 top of damages: 5 "... is interest of money within the meaning of 6 Schedule D to the Income Tax Act 1918." 7 That's what I showed your Lordship yesterday, the 8 charging provisions under Schedule D, case 3, simply 9 charge all interest of money.</p> <p>10 MR JUSTICE HILDYARD: <i>Riches</i> was really a case on whether 11 tax should be payable in respect of a damages claim, 12 wasn't it? 13 MR GARDINER: Yes, that's right. That was the argument.</p> <p>14 MR JUSTICE HILDYARD: Does the phrase "yearly interest of 15 money", which counsel subsequently attributes to the 16 case when arguing <i>Jefford v Gee</i>, appear in this case, 17 <i>Riches</i>? 18 MR GARDINER: No, it's all about interest of money.</p> <p>19 MR JUSTICE HILDYARD: So the phrase "yearly interest" never 20 occurs? 21 MR GARDINER: That's right. You can see, if you look at the 22 first break on that page: 23 "The appellant contends that the additional sum of 24 £10,000-odd, although awarded ...(Reading to the 25 words)... is not really interest, such as attracts</p> <p style="text-align: right;">Page 20</p>

<p>1 income tax, but is damages."</p> <p>2 MR JUSTICE HILDYARD: Yes.</p> <p>3 MR GARDINER: So that's what the argument is about.</p> <p>4 Then Jefford v Gee --</p> <p>5 MR JUSTICE HILDYARD: It is unfair to say so, but I don't</p> <p>6 think it was argued -- it was argued by people who are</p> <p>7 interested in damages, if I can put it that way.</p> <p>8 MR GARDINER: Yes.</p> <p>9 MR JUSTICE HILDYARD: But at 134G you get the reference</p> <p>10 which may have clouded the debate, which is:</p> <p>11 "Interest on debt or damages is subject to tax as</p> <p>12 'yearly interest of money'."</p> <p>13 But that is not what Riches concerned, was it?</p> <p>14 MR GARDINER: That is looking at Jefford v Gee, my Lord, is</p> <p>15 it?</p> <p>16 MR JUSTICE HILDYARD: Yes, in the argument of counsel.</p> <p>17 MR GARDINER: Your Lordship has picked it up entirely. That</p> <p>18 was where I was going to start.</p> <p>19 MR JUSTICE HILDYARD: Right.</p> <p>20 MR GARDINER: It is -- no, it is Mr Stocker and Mr Turner</p> <p>21 and, yes, you're absolutely right. 134G, they say:</p> <p>22 "Interest on debt or damages is subject to tax as</p> <p>23 'yearly interest of money': see Riches v Westminster</p> <p>24 Bank."</p> <p>25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 21</p>	<p>1 interest of money: see Riches v Westminster Bank."</p> <p>2 So that, we would submit, is unfortunately, picked</p> <p>3 up from the submission of counsel. All one can say</p> <p>4 is --</p> <p>5 MR JUSTICE HILDYARD: Where is that, sorry? Yes, I have it</p> <p>6 there.</p> <p>7 MR GARDINER: Yes, I am sorry, it is 149, just above</p> <p>8 letter C.</p> <p>9 As I said, Riches v Westminster Bank is not</p> <p>10 authority for that proposition. Then he ends up clearly</p> <p>11 saying:</p> <p>12 "We do not think that the courts awarding interest</p> <p>13 should get involved in these questions. Interest should</p> <p>14 be computed and awarded as a gross sum payable by the</p> <p>15 defendant ...(Reading to the words)... deduct tax or</p> <p>16 not."</p> <p>17 MR JUSTICE HILDYARD: It fell into charge to tax because it</p> <p>18 was interest of money?</p> <p>19 MR GARDINER: Yes. That's right, my Lord. This, as I say,</p> <p>20 was the only authority referred to in the Revenue's</p> <p>21 letter of 2 March and it isn't any authority, with the</p> <p>22 greatest of respect, on yearly interest at all, when one</p> <p>23 comes down, as a matter of analysis, to look at it.</p> <p>24 MR JUSTICE HILDYARD: But there was debate, wasn't there, as</p> <p>25 to when the interest should start? If you see at 138H,</p> <p style="text-align: center;">Page 23</p>
<p>1 MR GARDINER: That's wrong.</p> <p>2 MR JUSTICE HILDYARD: It doesn't seem to be --</p> <p>3 MR GARDINER: It isn't authority for that proposition.</p> <p>4 Then, of course, if you go then to -- there are perhaps</p> <p>5 one or two other points in Lord Denning's judgment,</p> <p>6 which perhaps I can pick up, that might help a little</p> <p>7 bit. His judgment starts at page 141. He refers to the</p> <p>8 question at letter H. I don't need, perhaps, to read</p> <p>9 that.</p> <p>10 He refers at page 143 to the well-known case of</p> <p>11 London, Chatham and Dover Railway Company v South</p> <p>12 Eastern Railway Company, where the House of Lords</p> <p>13 declined to award interest on damages as a matter of</p> <p>14 common law and what Lord Herschell said was, "Well,</p> <p>15 perhaps in principle that's wrong because the plaintiff</p> <p>16 has been out of his money and he ought to be</p> <p>17 compensated", et cetera.</p> <p>18 One can see the various points in relation to that</p> <p>19 which are made on 144, but essentially, all of that</p> <p>20 argument is about the extent of damages and the extent</p> <p>21 of the interest and then he deals with tax at page 149.</p> <p>22 All one can say about it, really, is it is two</p> <p>23 paragraphs that -- the heading, "5. Tax", starts:</p> <p>24 "When the court awards ...(Reading to the words)...</p> <p>25 the interest is subject to tax because there is yearly</p> <p style="text-align: center;">Page 22</p>	<p>1 the submission of counsel is:</p> <p>2 "The judge only sits in judgment on an accrued</p> <p>3 right. He can only assess damages in respect of accrued</p> <p>4 rights."</p> <p>5 You say that the statutory entitlement is not</p> <p>6 an accrued right, it's a right which vests upon</p> <p>7 a certain event but not until then?</p> <p>8 MR GARDINER: That's right, yes.</p> <p>9 One can imagine a certain number of circumstances,</p> <p>10 but we don't have to go into it. All I am saying for</p> <p>11 the moment is there is no clear authority on the</p> <p>12 question of what is the position of an award of interest</p> <p>13 in respect of damages. One can imagine there is</p> <p>14 a spectrum, in a sense. You might have a situation</p> <p>15 where it is so blindingly obvious that something has</p> <p>16 happened and it is blindingly obvious because of</p> <p>17 authority, that the court will award interest in respect</p> <p>18 of it.</p> <p>19 At one end of the spectrum, there is that. There</p> <p>20 might be another situation where it is not at all</p> <p>21 blindingly obvious and it might be, actually, very</p> <p>22 debatable. That might be, perhaps, a different end of</p> <p>23 that particular spectrum. But for our purposes, we're</p> <p>24 saying there is no authority on that issue. Jefford v</p> <p>25 Gee is certainly not authority on that issue. It is</p> <p style="text-align: center;">Page 24</p>

<p>1 therefore of no assistance to your Lordship and it is</p> <p>2 not part of this case for your Lordship to decide</p> <p>3 another issue, which doesn't arise upon the facts of</p> <p>4 this particular case, and that will, no doubt, have to</p> <p>5 be determined on some other case, in relation to facts</p> <p>6 that are relevant to such an issue.</p> <p>7 MR JUSTICE HILDYARD: On the Revenue's case -- Mr Goy will</p> <p>8 explain why this shouldn't (inaudible), I am just</p> <p>9 speaking so he gives me assistance on the points that</p> <p>10 I am muddled about -- in any damages claim, such as</p> <p>11 Jefford v Gee, where the accident took place a year or</p> <p>12 more before final judgment -- is that right? -- there</p> <p>13 would be yearly interest?</p> <p>14 MR GARDINER: They would say it is yearly interest.</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR GARDINER: I am merely saying that there may be</p> <p>17 a spectrum of circumstances. That might be right in the</p> <p>18 kind of case that I mentioned at the one end of that</p> <p>19 spectrum, where it is actually blindingly obvious to</p> <p>20 anybody looking at it, at the moment that the accident</p> <p>21 occurred, or whatever it was, there was clearly a claim</p> <p>22 that was unanswerable and that clearly, that claim would</p> <p>23 accrue interest. That might be one spectrum to the</p> <p>24 matter.</p> <p>25 There might be other circumstances where you</p> <p style="text-align: center;">Page 25</p>	<p>1 relation to this case, is that:</p> <p>2 "Entitlement to the interest in that case, only</p> <p>3 arose as from the date of the deed."</p> <p>4 If I can just read the headnote, one can see the</p> <p>5 facts of the case. That statement, we say, with the</p> <p>6 greatest respect, is simply wrong when one looks,</p> <p>7 actually, at the case. It is a short headnote behind</p> <p>8 tab 39. One notices:</p> <p>9 "In 1923, the appellant, one of the trustees of</p> <p>10 certain settlements which he had made in favour of his</p> <p>11 children, realised the trust investments and reinvested</p> <p>12 the proceeds in his own name, in unauthorised securities</p> <p>13 which subsequently fell in value."</p> <p>14 Pausing there, that's a clear breach of trust.</p> <p>15 A clear breach of his duties as a matter of trust law:</p> <p>16 "Subsequently, by deed dated 27 March 1930 ..."</p> <p>17 So the breach of trust occurred in 1923:</p> <p>18 "Subsequently, by deed dated 27 March 1930, he</p> <p>19 ...(Reading to the words)... until 1 January 1930.</p> <p>20 "On appeal against assessments for surtax</p> <p>21 ...(Reading to the words)... in which it was paid."</p> <p>22 It was held that amount in question was yearly</p> <p>23 interest.</p> <p>24 You see it refers to Commissioners of Inland Revenue</p> <p>25 v Barnato. Now they rely on this case as authority for</p> <p style="text-align: center;">Page 27</p>
<p>1 couldn't be so confident about that. But what one is</p> <p>2 saying is that there is no authority on that, Jefford v</p> <p>3 Gee certainly isn't one and, as I said, it's not this</p> <p>4 case and it's not necessary for your Lordship to</p> <p>5 actually determine that matter.</p> <p>6 To the like effect, in my learned friend's skeleton,</p> <p>7 they have introduced two other cases. It might help in</p> <p>8 answering that question of your Lordship's, if I were</p> <p>9 actually to look at those two cases, because neither of</p> <p>10 them, with respect, stand as authority for what the</p> <p>11 other side say they stand for.</p> <p>12 These are referred to in, I think, paragraph 18 of</p> <p>13 my learned friend's skeleton. They set out the three</p> <p>14 cases in them. The first is a case called Barlow. The</p> <p>15 second one is a case called Regal (Hastings) v Gulliver</p> <p>16 but your Lordship will also be very familiar with the</p> <p>17 decision of the House of Lords in Regal (Hastings) but</p> <p>18 this is in relation to the interest and it's a decision</p> <p>19 of Cassels J in respect of that interest.</p> <p>20 Then the last one they refer to is Jefford v Gee</p> <p>21 itself and I have already dealt with my points about</p> <p>22 Jefford v Gee.</p> <p>23 But in relation to the first case, the case of</p> <p>24 Barlow, it's at tab 39.</p> <p>25 What they say in paragraph 18 of their skeleton, in</p> <p style="text-align: center;">Page 26</p>	<p>1 saying that it is only from the date of the deed that</p> <p>2 there was any entitlement to the interest. It only</p> <p>3 arose from the date of the deed, they say. We say,</p> <p>4 well, with the greatest of respect, that's incorrect.</p> <p>5 As one can see from the judgment and actually from</p> <p>6 authority, the entitlement arose not in 1930, the date</p> <p>7 of the deed, the entitlement arose in 1923, when the</p> <p>8 breach of trust occurred. And from that date, that was</p> <p>9 a breach of trust and in consequence of that breach of</p> <p>10 trust, there was a clear entitlement to have the losses</p> <p>11 reinstated as a matter of equity, an account in respect</p> <p>12 of those losses, and with interest in respect of those</p> <p>13 losses on such an account, as a matter of equity.</p> <p>14 So as a matter of law, there was a clear entitlement</p> <p>15 in 1923 to refund the losses plus interest. It did not</p> <p>16 arise de novo in 1930. All that 1930 did was to</p> <p>17 recognise that there was an existing liability that had</p> <p>18 arisen in 1923 and arose with interest attaching to it</p> <p>19 and accruing to it.</p> <p>20 That is plain from the judgment and one can see, in</p> <p>21 particular, the reference -- one can see this in many of</p> <p>22 the cases, and this is the same point in the</p> <p>23 Regal (Hastings) case as well, that we will come to in</p> <p>24 a moment. But the judge, Mr Justice Finlay in this</p> <p>25 case, relies in particular, on the very famous 19th</p> <p style="text-align: center;">Page 28</p>

<p>1 century case called Vyse v Foster. I will show 2 your Lordship that he refers to it in his judgment and 3 that's all we actually need. I could give you the 4 judgment, if you need to look at it, but I mean the 5 passage quoted is well known. It's an observation of 6 Lord Justice James in the Court of Appeal and approved 7 in the House of Lords in that particular case. It was 8 a great Forsyte Saga case in the 1850s. There was 9 a family partnership of individuals that was worth, at 10 the time, something approaching £250,000, which was 11 a matter of some significance and that's why it went 12 through all the processes to the House of Lords. 13 But you can see it is picked up by Finlay J and it 14 is picked up really, towards the beginning of his 15 judgment. You will see his judgment at page 5 and you 16 can see the first few lines, he says: 17 "This is an appeal for the decision of the Special 18 Commissioners ...(Reading to the words)... and to 19 a breach of trust." 20 Then if one sees the next paragraph and one goes 21 down to it -- perhaps I better read it. It is the 22 middle of that paragraph but just starting at the 23 beginning of it: 24 "I should go into the case, of course, but I must 25 say at once ...(Reading to the words)... 1923."</p> <p style="text-align: center;">Page 29</p>	<p>1 "... to pay to the trustees ...(Reading to the 2 words)... between 1923 and 1930." 3 So all the deed actually did was to recite 4 an existing liability to make good the original loss to 5 the trust of that first amount, the 27,000-odd and the 6 7,000 is the amount of the interest on it. 7 You can see that from, I'm afraid, the little 8 passage on the previous page that I didn't actually 9 read. You can see that: 10 "From the ...(Reading to the words)... will amount 11 to 7,704." 12 So the deed simply recognises an existing liability 13 to repay the loss because of the breach of trust, plus 14 a liability to pay interest from that date. All that 15 deed does is recognise an existing liability. 16 Then if one looks at the second break on page 6, the 17 paragraph beginning: 18 "Now what really happened was this ..." 19 And four or five lines down, there is a sentence 20 beginning: 21 "The question raised in the appeal was as to the 22 compound interest [that's the £700,000-odd under the 23 deed] ...(Reading to the words)... that that sum was 24 yearly interest." 25 So he refers to the decision of the Court of Appeal</p> <p style="text-align: center;">Page 31</p>
<p>1 It's the next part: 2 "It was found that in 1923, the appellant became 3 anxious about ...(Reading to the words)... full 4 responsibility ..." 5 So this is all 1923 that he's talking about: 6 "... accepted the full responsibility and told his 7 co-trustees what he had done. Now it was quite plain 8 that there was, therefore, in 1923, a breach of trust by 9 the appellant." 10 Then we go to the year 1930 and in that year: 11 "The appellant, having had his attention again 12 drawn, called to this breach of trust and the liability 13 therefore, decided to regularise the matter by 14 accounting for all the trust monies. With that object, 15 a deed, called a deed of covenant ...(Reading to the 16 words)... roughly seven years after the breach of 17 trust." 18 But then he refers to the terms of it and you can 19 see at the end of the page, the recital goes on: 20 "Whereas it is apprehended ..." 21 Then over the page: 22 "... the settlor is apprehended that the settlor is 23 liable to pay to the trustees." 24 So the deed is reciting the existing liability of 25 the settlor:</p> <p style="text-align: center;">Page 30</p>	<p>1 in Barnato's case and there is a reference to where that 2 is reported in the tax cases but this is the material 3 point: 4 "Before coming to that case, it is perhaps desirable 5 and I should just refer to an authority to which my 6 attention was called. It is common ground which lays 7 down the law on this matter. The authority is the case 8 of Vyse v Foster ...(Reading to the words)... to make 9 good the trust funds and interest." 10 Just pausing there -- he goes on. But that is the 11 fundamental principle. That has never been gainsaid. 12 We could trace it through. That case of Vyse v Foster, 13 as I said, went to the House of Lords, it was approved 14 in the House of Lords. It has never been doubted. One 15 can refer to authorities in the Court of Appeal of ten 16 or 12 years ago, if necessary, which all sort of apply 17 that particular principle. But as a matter of equitable 18 principle, if there is a breach of trust of that 19 particular nature, there is a liability to make good, 20 there is a liability to make good from that particular 21 moment and interest runs on it. 22 It is important to bear that in mind in looking at 23 this particular case. The equitable position is 24 different from that at common law. One can remember, as 25 I've mentioned already, the London, Dover and Chatham</p> <p style="text-align: center;">Page 32</p>

<p>1 Railway, the La Pintada case, and one can go on to more</p> <p>2 modern cases, such as Sempra Metals and all the rest of</p> <p>3 it. Equity has had a different approach but the</p> <p>4 equitable approach is there is a liability as at the</p> <p>5 date of breach of trust and interest runs on it from</p> <p>6 that particular moment in time, and therefore it is</p> <p>7 wrong for the other side to say "Ah, a liability sprung</p> <p>8 up at the date of the deed. This was a liability</p> <p>9 calculated by reference to the past. Ah, that was held</p> <p>10 to be yearly interest, ergo that is authority relevant</p> <p>11 to this case". It is no authority whatsoever relevant</p> <p>12 to this case. It is a clear case of a liability from</p> <p>13 the outset, in 1923, with interest accruing on it. It</p> <p>14 therefore fulfils all the criteria that we say are</p> <p>15 criteria for the establishment of yearly interest.</p> <p>16 So it is of no assistance to the other side</p> <p>17 whatsoever.</p> <p>18 MR JUSTICE HILDYARD: I suppose in the eyes of equity, the</p> <p>19 interest which was run belonged in equity at all times,</p> <p>20 to the claimant beneficiaries.</p> <p>21 MR GARDINER: To the Sutesco Trust, yes, who lost the money.</p> <p>22 MR JUSTICE HILDYARD: All that equity required was</p> <p>23 an accounting of the receipt.</p> <p>24 MR GARDINER: Precisely. That is the point of accounting in</p> <p>25 equity.</p> <p style="text-align: center;">Page 33</p>	<p>1 relevant yearly interest was awarded by the court</p> <p>2 pursuant ...(Reading to the words)... of the Law Reform</p> <p>3 (Miscellaneous Provisions) Act 1934."</p> <p>4 Now as far as Regal (Hastings) is concerned, that's</p> <p>5 just downright wrong. It wasn't. We have looked at the</p> <p>6 decision of the House of Lords. We have looked at the</p> <p>7 first instance decision of Wrottesley J. We have looked</p> <p>8 at the appellants' case in the House of Lords in Regal</p> <p>9 (Hastings) v Gulliver. It has nothing whatsoever to do</p> <p>10 with the 1934 Act in respect of damages at common law.</p> <p>11 What happened in Regal (Hastings) v Gulliver was the</p> <p>12 original claim was a claim in respect of saying as</p> <p>13 regards those various directors, they had to disgorge</p> <p>14 their profit because they were in a fiduciary position,</p> <p>15 a trust position, had acted in breach of trust and they</p> <p>16 were required to disgorge their profit and to disgorge</p> <p>17 it with interest.</p> <p>18 The case at first instance before Wrottesley J went</p> <p>19 off at a bit of a tangent because Sir Patrick Hastings</p> <p>20 got involved and he obviously thought it was a case</p> <p>21 about fraud albeit that fraud had never been pleaded.</p> <p>22 And he, as I think Wrottesley J said, cross-examined the</p> <p>23 defendants mercilessly. But at the end of the day,</p> <p>24 Wrottesley J said that "There is no claim pleaded for</p> <p>25 fraud and I am not going to hold it was fraud."</p> <p style="text-align: center;">Page 35</p>
<p>1 So, as we say, it is completely misleading to</p> <p>2 suggest that that case is some kind of authority for</p> <p>3 some contingency, the deed, in respect of a calculation</p> <p>4 of interest of the past and say "Ah, that is authority</p> <p>5 for this case". It is no authority for this case at</p> <p>6 all.</p> <p>7 It is exactly the same point in the case that they</p> <p>8 next refer to, which is the judgment of Cassels J in</p> <p>9 Regal (Hastings) v Gulliver.</p> <p>10 Your Lordship will obviously be very familiar, no</p> <p>11 doubt far more familiar than I, but even I can remember</p> <p>12 Regal (Hastings) v Gulliver when I was a student,</p> <p>13 although curiously enough, it was a case decided, I</p> <p>14 think, in 1942 but only actually managed to get into the</p> <p>15 full Law Reports in 1967.</p> <p>16 MR JUSTICE HILDYARD: And then only by a note.</p> <p>17 MR GARDINER: But they do actually reproduce the judgment.</p> <p>18 But if I make the point about Regal (Hastings) v</p> <p>19 Gulliver, it is exactly the same position because it</p> <p>20 an equitable case. What happened -- your Lordship will</p> <p>21 remember all the facts, I don't need to go into that,</p> <p>22 but the other side, in footnote 2, I think, of their</p> <p>23 skeleton argument, suggests it is a case on the law</p> <p>24 of -- yes, in footnote 2 they say:</p> <p>25 "In both Regal (Hastings) and Jefford v Gee, the</p> <p style="text-align: center;">Page 34</p>	<p>1 The case thereafter was simply on the basis that</p> <p>2 those directors were in breach of their fiduciary duties</p> <p>3 and the case to the House of Lords -- the appeal to the</p> <p>4 House of Lords was simply on that basis and it was</p> <p>5 simply on that basis that they were therefore in breach</p> <p>6 of trust and they, therefore, had to account for the</p> <p>7 loss and they had to account as a matter of equity, with</p> <p>8 interest on it.</p> <p>9 We could show your Lordship, if necessary, the case</p> <p>10 to the House of Lords with that particular claim but one</p> <p>11 can actually see it, if one needed to look at it, in the</p> <p>12 very first judgment, where Viscount Sankey says, this is</p> <p>13 it, "It's a trust claim and a trust claim for an account</p> <p>14 on that basis."</p> <p>15 I am sure your Lordship is, actually, perfectly well</p> <p>16 aware of that decision, the decision being on the basis</p> <p>17 of fiduciary duties, breach of those fiduciary duties.</p> <p>18 So that is why, in the case -- the appellants lost</p> <p>19 in both cases below and the only occasion at which any</p> <p>20 interest is awarded is by the House of Lords and it is</p> <p>21 awarded automatically because they are employing the</p> <p>22 same principles that we've just seen from Vyse v Foster,</p> <p>23 that it is a breach of trust, it is a breach of</p> <p>24 fiduciary duty and therefore equity provides the answer.</p> <p>25 Equity says "You have to pay up the money that you've</p> <p style="text-align: center;">Page 36</p>

<p>1 made. You have got to disgorge the profit and you have</p> <p>2 to disgorge the profit plus interest, from the moment of</p> <p>3 time that you made the profit." That's what they</p> <p>4 ordered in Regal (Hastings) v Gulliver.</p> <p>5 So if one looks at what Cassels J says --</p> <p>6 MR JUSTICE HILDYARD: The headnote refers to law reform</p> <p>7 interest.</p> <p>8 MR GARDINER: My Lord, I'm sorry?</p> <p>9 MR JUSTICE HILDYARD: The headnote, for some reason, refers</p> <p>10 to Law Reform (Miscellaneous Provisions) Act 1934</p> <p>11 section 43, in the decision of Cassels J.</p> <p>12 MR GARDINER: Yes. All one can say is that's actually</p> <p>13 wrong. If one looks at what he actually says -- perhaps</p> <p>14 one reads the actual headnote. You are perfectly</p> <p>15 familiar, I think, obviously, with the case. I am not</p> <p>16 sure I do really need to read it, although I just</p> <p>17 remind --</p> <p>18 MR JUSTICE HILDYARD: Cassels J says, left and right, bottom</p> <p>19 line left:</p> <p>20 "It is to be observed that the defendants were not</p> <p>21 held to be liable to account to the plaintiffs by reason</p> <p>22 of any default or fraud or any other tort or breach of</p> <p>23 contract."</p> <p>24 That seems to put it out of the Law Reform and so</p> <p>25 require it to have been on some accounting and equity</p> <p style="text-align: center;">Page 37</p>	<p>1 invested it at the moment they received it and therefore</p> <p>2 must pay interest from that moment, to the time six and</p> <p>3 a half years later.</p> <p>4 So, again, we say it is plain and as I said, I am</p> <p>5 not going to bother your Lordship with the actual</p> <p>6 decision of the House of Lords because I am sure you're</p> <p>7 absolutely perfectly well familiar with it. But as</p> <p>8 I say, we've looked at every absolutely conceivable</p> <p>9 point at which it could be said that the 1934 Act has</p> <p>10 any relevance to it at all and there is absolutely no</p> <p>11 reference to it whatsoever in the decision of the</p> <p>12 House of Lords. It was never of any relevance in any of</p> <p>13 the courts below. The case to the House of Lords, now</p> <p>14 just put by Mr Miller, Sir Patrick Hastings having gone</p> <p>15 off the scene which perhaps is an advantage to the</p> <p>16 plaintiffs, in the sense that they managed to win in the</p> <p>17 House of Lords, not having won elsewhere, was entirely</p> <p>18 on the basis of breach of trust and accounting for that</p> <p>19 breach of trust.</p> <p>20 So, again, this case is relied on by the other side,</p> <p>21 on the basis that somehow it is the determination by the</p> <p>22 House of Lords that creates the liability. It's not so.</p> <p>23 What the House of Lords did was to recognise that</p> <p>24 a liability had arisen --</p> <p>25 MR JUSTICE HILDYARD: It may be the difference between the</p> <p style="text-align: center;">Page 39</p>
<p>1 basis.</p> <p>2 MR GARDINER: Yes. You can see he is replying to</p> <p>3 Keech v Sandford. That left --:</p> <p>4 "... applying the law of ...(Reading to the</p> <p>5 words)... by the use of that position and must account."</p> <p>6 We know as a matter of accounting in equity, if you</p> <p>7 have got to account, you've got to account for the loss</p> <p>8 and you've got to account for the loss plus interest.</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 MR GARDINER: You can see that over the page at 299, the</p> <p>11 left-hand column. The second line up:</p> <p>12 "... or whether it was part of the result of the</p> <p>13 application of the equitable rule as to the</p> <p>14 accountability of directors standing in a fiduciary</p> <p>15 relationship to their company."</p> <p>16 Then on the right-hand side, 299, below the middle</p> <p>17 of the page, there is a reference to Mr Beney, who</p> <p>18 referred to Cooper v Gateshead and the judge saying</p> <p>19 after that, at the beginning:</p> <p>20 "I have to deal with the facts in this case because</p> <p>21 the House of Lords has held in 1942, the defendants, the</p> <p>22 directors ...(Reading to the words)... in trust for the</p> <p>23 plaintiff."</p> <p>24 So there is a liability for the breach of trust</p> <p>25 since 1935 and that the directors must be taken to have</p> <p style="text-align: center;">Page 38</p>	<p>1 accrued date and the due date, I don't know, but there</p> <p>2 is a puzzling reference at the end of Cassels J's</p> <p>3 judgment, isn't there?</p> <p>4 Where he says in the last 15 lines:</p> <p>5 "This is a case of interest which nobody knew would</p> <p>6 be payable ...(Reading to the words)... until the date</p> <p>7 of that decision."</p> <p>8 What does he mean by that?</p> <p>9 MR GARDINER: I think what he means is that there wasn't any</p> <p>10 recognition of that existing liability until the</p> <p>11 House of Lords recognised it and I would say it's in</p> <p>12 exactly the same position as the previous case of Barlow</p> <p>13 that we're looking at, in the sense that in Barlow, the</p> <p>14 deed recognised an existing liability. With the</p> <p>15 greatest respect, courts don't create liabilities, they</p> <p>16 recognise liabilities. That is fundamental to every</p> <p>17 single aspect of the rule of law and our constitution.</p> <p>18 One can go into jurisprudential points as to whether</p> <p>19 judges make new law, and one can go back to Lord Devlin</p> <p>20 and Lord Denning making different points on that. But</p> <p>21 that's not the situation we're concerned with. Not the</p> <p>22 kind of situation that is the run-of-the-mill</p> <p>23 determination by the courts. It is not, with the</p> <p>24 greatest respect to your Lordship, your job to create</p> <p>25 a liability. It is your job --</p> <p style="text-align: center;">Page 40</p>

<p>1 MR JUSTICE HILDYARD: There is no question of that here,</p> <p>2 Mr Gardiner, because this statute has done it for me and</p> <p>3 the only question is what the characterisation of the</p> <p>4 statute is.</p> <p>5 MR GARDINER: What it means, yes.</p> <p>6 MR JUSTICE HILDYARD: But I am just puzzling over, "I don't</p> <p>7 think the amount of interest became due until the date</p> <p>8 of that decision."</p> <p>9 MR GARDINER: But that is simply a part of the obiter in his</p> <p>10 case and I think all that one can actually get from it</p> <p>11 is, first of all, there is a recognition in the</p> <p>12 House of Lords that there was a breach of trust in 1935.</p> <p>13 From that particular moment in time, interest is treated</p> <p>14 as running.</p> <p>15 That, in accordance with the equitable rule, means</p> <p>16 that there was a liability to pay that sum of money from</p> <p>17 the date that the directors made the profit. That is</p> <p>18 the basis on which the interest is calculated and it was</p> <p>19 due at that particular moment, despite what he is saying</p> <p>20 at the end there, of time, because if it wasn't due from</p> <p>21 that particular moment, it has no right to run.</p> <p>22 MR JUSTICE HILDYARD: But in the House of Lords was the</p> <p>23 decision that the trustees should cough up for their</p> <p>24 receipt or was it that they should be subject to</p> <p>25 interest pursuant to statute, on the footing of what</p> <p style="text-align: center;">Page 41</p>	<p>1 the decision of the House of Lords.</p> <p>2 But just making the point, it's an equitable remedy</p> <p>3 as at the moment of time that they acquired these</p> <p>4 shares, then they sold them, and each of them made</p> <p>5 a profit on them of approximately £1,400. The decision</p> <p>6 of the House of Lords is that from that moment of time,</p> <p>7 they were due to account for that profit from that</p> <p>8 moment of time, as a matter of equity, because that was</p> <p>9 a trust remedy, breach of their fiduciary duty,</p> <p>10 et cetera, and then at the end of the judgment, and</p> <p>11 I think it is, in particular, Lord Wright, if my</p> <p>12 recollection is correct, they simply award interest on</p> <p>13 that at 4 per cent.</p> <p>14 MR JUSTICE HILDYARD: At 4 per cent?</p> <p>15 MR GARDINER: I think it is 4 per cent.</p> <p>16 MR JUSTICE HILDYARD: So it wasn't that reference to what</p> <p>17 the trustees had actually earned, we don't know that.</p> <p>18 It was on the footing of some jurisdiction which you say</p> <p>19 was equitable.</p> <p>20 MR GARDINER: Yes, it is what James LJ said in Vyse v</p> <p>21 Foster. He says if you have a breach of trust, then you</p> <p>22 have an obligation to account for the consequences of</p> <p>23 the breach of trust, plus interest on it. That was</p> <p>24 always for the court of equity to actually prescribe</p> <p>25 that interest had to be paid on it.</p> <p style="text-align: center;">Page 43</p>
<p>1 they had received, whether or not they had received</p> <p>2 interest? Do you see what I mean? I haven't put it</p> <p>3 very well.</p> <p>4 MR GARDINER: We could show your Lordship the judgment, but</p> <p>5 we've looked at it very carefully. The basis of the</p> <p>6 decision is that they were liable from the date that</p> <p>7 they made the profit.</p> <p>8 MR JUSTICE HILDYARD: That I can understand. I mean,</p> <p>9 a trustee could be liable on two footings, couldn't he?</p> <p>10 One is if the trustee has actually received interest and</p> <p>11 it is at a rate which the beneficiary likes the look of</p> <p>12 and says "Account to me for that because through the</p> <p>13 eyes of equity, what you think is your money is my</p> <p>14 money. Give it over". Alternatively, if the rate</p> <p>15 doesn't look too good or if no interest has been earned</p> <p>16 at all, the beneficiary can say "You took the money, you</p> <p>17 must now be subject to compensate me by the addition of</p> <p>18 interest at the statutory rate, compounded if the court</p> <p>19 of equity thinks that appropriate". Which was it in</p> <p>20 Regal (Hastings)?</p> <p>21 MR GARDINER: It is the second but it's not a statutory</p> <p>22 rate, it's the equitable rate, because it is</p> <p>23 an equitable remedy. Each of them made, I think,</p> <p>24 a profit of £1,400 and we could show you the decision.</p> <p>25 Do we have copies of it? We probably do have copies of</p> <p style="text-align: center;">Page 42</p>	<p>1 We do actually have some copies of it, although I am</p> <p>2 bereft of my own, which is unfortunate. (Pause)</p> <p>3 The main judgment was given by Lord Russell of</p> <p>4 Killarney.</p> <p>5 At page 137, this is Viscount Sankey, we can just</p> <p>6 see just above letter E:</p> <p>7 "The appellants say they are entitled to succeed</p> <p>8 ...(Reading to the words)... is equally applicable to</p> <p>9 directors and solicitors."</p> <p>10 May I just pause there. So they are relying upon</p> <p>11 the equitable jurisdiction in relation to trustees, in</p> <p>12 relation to directors.</p> <p>13 MR JUSTICE HILDYARD: Yes, that's to reclaim the profit.</p> <p>14 MR GARDINER: Yes.</p> <p>15 MR JUSTICE HILDYARD: What about the interest?</p> <p>16 MR GARDINER: Yes. So that's the doctrine and the doctrine,</p> <p>17 as you will have seen from James LJ in Vyse v Foster, is</p> <p>18 that in those circumstances, they have to account for</p> <p>19 the profit plus interest --</p> <p>20 MR JUSTICE HILDYARD: If they've earned it, but what if they</p> <p>21 haven't?</p> <p>22 MR GARDINER: No, my Lord, with respect, no. I think that's</p> <p>23 perhaps where we're differing. In Vyse v Foster,</p> <p>24 James LJ is saying:</p> <p>25 "The principle of equity is simply this. If you</p> <p style="text-align: center;">Page 44</p>

<p>1 have a breach of trust, then you have to account for the</p> <p>2 consequences of the breach of trust, so as to recompense</p> <p>3 for the money lost upfront and you have to account for</p> <p>4 interest on it."</p> <p>5 He's saying that's the basic principle and that's</p> <p>6 the basic principle --</p> <p>7 MR JUSTICE HILDYARD: I am just cavilling that you can't</p> <p>8 really account for something you don't have. I am</p> <p>9 trying to find out whether the basis for the interest is</p> <p>10 clawing back what they had in fact received by way of</p> <p>11 an account or by imposing some liability, whether under</p> <p>12 common law, equity or statute?</p> <p>13 MR GARDINER: It is the latter.</p> <p>14 MR JUSTICE HILDYARD: You say it is the latter and I am</p> <p>15 trying to find where they say that in --</p> <p>16 MR GARDINER: Unfortunately, they don't say it because</p> <p>17 I think they simply acknowledge that it is the equitable</p> <p>18 principle, which is as stated by James LJ, and you will</p> <p>19 see, actually, when we look at -- Lord Russell is the</p> <p>20 main judgment and all he does at the end of his judgment</p> <p>21 is say:</p> <p>22 "... and there has to be interest on it at this</p> <p>23 particular rate."</p> <p>24 MR JUSTICE HILDYARD: Where does he say that?</p> <p>25 MR GARDINER: If I can just find that, if you bear with me.</p> <p style="text-align: center;">Page 45</p>	<p>1 But he is the only person who actually deals with</p> <p>2 the actual order and the interest point and nobody else</p> <p>3 says anything about the interest.</p> <p>4 With the greatest respect, every single part of</p> <p>5 these judgments is all on the basis that this is</p> <p>6 a breach of trust. It is therefore an equitable remedy,</p> <p>7 and interest simply follows as a matter of equity.</p> <p>8 So we say that Barlow and Regal (Hastings) are in</p> <p>9 the like position. They don't stand as a proposition</p> <p>10 for what the other side wish to make them stand. They</p> <p>11 are cases where there was a liability ab initio and</p> <p>12 interest ran on that liability and it accrued over</p> <p>13 a period of time and therefore it is not surprising that</p> <p>14 the result was that they were held to be yearly</p> <p>15 interest.</p> <p>16 My Lord, just to conclude this, there is one other</p> <p>17 case that my learned friends kindly suggested us to last</p> <p>18 night that they propose to refer to. I thought about</p> <p>19 whether we ought to refer to this case, prior to our own</p> <p>20 submissions but on the basis that it wasn't in their</p> <p>21 skeleton, we didn't.</p> <p>22 The reason why we have it is I actually think that</p> <p>23 it is more likely to mislead than to help in the</p> <p>24 elucidation of this particular issue, but I think it</p> <p>25 might be worthwhile if I just make a few observations</p> <p style="text-align: center;">Page 47</p>
<p>1 (Pause)</p> <p>2 MR JUSTICE HILDYARD: He begins at 140.</p> <p>3 MR GARDINER: Right. I am grateful. (Pause)</p> <p>4 152E. I am grateful, thank you.</p> <p>5 MR JUSTICE HILDYARD: We don't know about the 4 per cent?</p> <p>6 It may not matter, Mr Gardiner.</p> <p>7 MR GARDINER: But there is no suggestion in any of the</p> <p>8 pleadings that these people invested it at 4 per cent</p> <p>9 and, therefore, they were accounting for that. The</p> <p>10 basic principle, again, I think is exactly what James LJ</p> <p>11 said in Vyse v Foster, that they had to account for the</p> <p>12 1,402 because that was the profit made on the sale of</p> <p>13 the shares and that was made on that particular date,</p> <p>14 October 25, 1935, and then they account for 4 per cent</p> <p>15 on that because that's in accordance with the rule that</p> <p>16 equity applies.</p> <p>17 There's always been this fundamental difference</p> <p>18 between the common law and equity, in the sense that</p> <p>19 equity, if there is a breach of trust, would ensure that</p> <p>20 there is compensation for the loss occasioned by the</p> <p>21 breach of trust, with interest on it. The common law</p> <p>22 got into this mess with cases such as London, Chatham</p> <p>23 and Dover Railway and the case of La Pintada, although</p> <p>24 much more recently perhaps, having been somewhat</p> <p>25 eliminated in the case of Semptra Metals.</p> <p style="text-align: center;">Page 46</p>	<p>1 about it. It is a case called Chevron. Again, if we</p> <p>2 could just hand that up and I will explain why I think</p> <p>3 it's not helpful, actually, to your Lordship in this</p> <p>4 matter.</p> <p>5 My learned friend can make whatever he wants to make</p> <p>6 about it, knowing what our position is about it.</p> <p>7 It is a fairly complicated case. But let me just --</p> <p>8 I want to deal with it fairly quickly.</p> <p>9 It is a case between, obviously, you will see, two</p> <p>10 petroleum companies, in respect of their respective</p> <p>11 interests in the North Sea and it is a decision of</p> <p>12 Sir Robert Megarry, the Vice-Chancellor then.</p> <p>13 The whole basis of the judgment is a judgment which</p> <p>14 is, in terms, dealing with, simply, interest of money</p> <p>15 and not yearly interest.</p> <p>16 You will find if you actually go through the</p> <p>17 judgment, every single point on any particular issue or</p> <p>18 any consideration is looking at the charging provisions</p> <p>19 of Schedule D, case 3, interest of money, and not yearly</p> <p>20 interest.</p> <p>21 But this may be the reason why the other side wish</p> <p>22 to refer to it because the reason why, in terms, it</p> <p>23 appears to have started, you can see from the beginning</p> <p>24 of Sir Robert Megarry's judgment on page 691. He says:</p> <p>25 "This is a case of the meaning of the term 'interest</p> <p style="text-align: center;">Page 48</p>

<p>1 of money'."</p> <p>2 That's absolutely right and that's all it is about:</p> <p>3 "As used in the Income and Corporation Taxes Act</p> <p>4 ...(Reading to the words)... case 3A."</p> <p>5 Now 192 case 3A is just interest of money and that's</p> <p>6 what all the argument is about. But section 54(1)</p> <p>7 referred to "yearly interest". If one looks at page 692</p> <p>8 just above -- well, between letters B and C, he made a</p> <p>9 point -- I mean this all whistled around in the long</p> <p>10 vacation, the wonderful days of the past, where we had</p> <p>11 a long vacation, but there we are.</p> <p>12 At letter B on 692 he says:</p> <p>13 "The originating summons before me, issued on 6 July</p> <p>14 by the Chevron Group ...(Reading to the words)... within</p> <p>15 the meaning of section 54."</p> <p>16 So one might have thought this case would be helpful</p> <p>17 on our issue:</p> <p>18 "... though the Income and Corporation Taxes Act</p> <p>19 1970 and, if so, how the yearly interest is to be</p> <p>20 calculated."</p> <p>21 Then he says:</p> <p>22 "Nobody, I may say, suggested that anything turned</p> <p>23 on the word 'yearly'."</p> <p>24 Now, there is a very good reason for that and I am</p> <p>25 not going to go through the rest of the judgment but you</p> <p style="text-align: center;">Page 49</p>	<p>1 all its expenditure to set against it and would either</p> <p>2 have made no tax on it at all or would have paid very</p> <p>3 little tax on it.</p> <p>4 So the crunch point, as far as Chevron was</p> <p>5 concerned, was whether this compound sum that had been</p> <p>6 paid could be split between two parts, one part being</p> <p>7 a payment for the use, as it were, of the facilities</p> <p>8 plus interest or whether it was simply one global sum</p> <p>9 for the use of the facilities.</p> <p>10 If it was the latter, Chevron were better off. If</p> <p>11 it was the former, they weren't.</p> <p>12 As far as BP was concerned, they would get</p> <p>13 a deduction for it if it was interest, either on the</p> <p>14 basis that it was a charge on income, if it was</p> <p>15 an annual payment or if it was yearly interest or,</p> <p>16 alternatively, simply get a deduction in computing their</p> <p>17 case on profits.</p> <p>18 So the only issue in the case was whether it was</p> <p>19 interest. That's why nobody actually argued about</p> <p>20 yearly interest because it was irrelevant to both</p> <p>21 parties.</p> <p>22 Had it been relevant to any of the parties, one is</p> <p>23 sure that the experienced counsel in the particular case</p> <p>24 would no doubt have taken that point.</p> <p>25 That's why I said that we took the view that it</p> <p style="text-align: center;">Page 51</p>
<p>1 will find, if you do, that the rest of the judgment is</p> <p>2 solely concerned with the question of: is this interest</p> <p>3 of money? There is no further consideration of the</p> <p>4 question of: is it yearly interest, as opposed to</p> <p>5 interest of money, whatsoever.</p> <p>6 So the only dispute and the only argument dealt with</p> <p>7 in the judgment is whether it was interest of money. It</p> <p>8 is exactly the same, in a sense, as far as that's</p> <p>9 concerned, as the case of <i>Riches v Westminster Bank</i>.</p> <p>10 There is no argument as to yearly interest.</p> <p>11 Now, there is a very, very, very good reason for</p> <p>12 that. This is why I think I have said we think the case</p> <p>13 is actually misleading, if you think it is some kind of</p> <p>14 authority on yearly interest. But it is not, because</p> <p>15 Chevron were the plaintiff in that case. As far as</p> <p>16 Chevron was concerned, it didn't make a ha'p'orth of</p> <p>17 difference whether it was interest or yearly interest.</p> <p>18 Indeed, as far as BP was concerned, at the end of the</p> <p>19 day, it likewise, didn't make any difference. The real</p> <p>20 thing that made a difference was, was it interest at</p> <p>21 all, because if it was interest, then Chevron was liable</p> <p>22 to tax on the whole of it.</p> <p>23 If it was not interest, but was simply part of this</p> <p>24 composite sum paid in respect of the exploitation of the</p> <p>25 interest in the North Sea, then Chevron would have had</p> <p style="text-align: center;">Page 50</p>	<p>1 wasn't going to help your Lordship. Those are the</p> <p>2 reasons why we took that view and why we haven't cited</p> <p>3 it. We would say, actually, any reliance on it is</p> <p>4 actually misleading, rather than of assistance to</p> <p>5 your Lordship, but that's what we say.</p> <p>6 As far as the actual judgment of Sir Robert Megarry</p> <p>7 is concerned, we have no issue with that at all. His</p> <p>8 judgment is simply, "This was interest". All the</p> <p>9 reasons he gives, in as far as we're concerned, are</p> <p>10 perfectly correct, perfectly all right, even insofar as</p> <p>11 interest is concerned and that's it. That was the only</p> <p>12 argument before him. We have no issue with any terms of</p> <p>13 his judgment.</p> <p>14 We can see that our issue wasn't there, because if</p> <p>15 you actually look at the authorities that were cited in</p> <p>16 the case, none of the relevant cases on yearly interest</p> <p>17 are actually referred to in the judgment.</p> <p>18 I think, I hope at least, that you could perhaps be</p> <p>19 handed up the terms with the case -- the terms of</p> <p>20 section 240 of the Income and Corporation Taxes Act</p> <p>21 1970. One can see there, it is in particular, 240(5).</p> <p>22 The reason why I say it is really of no problem to</p> <p>23 Chevron, Chevron were the recipient of what Sir Robert</p> <p>24 held to be interest. BP deducted tax at source from the</p> <p>25 payment of the interest.</p> <p style="text-align: center;">Page 52</p>

<p>1 As far as Chevron was concerned, they had</p> <p>2 a liability to corporation tax in respect of the whole</p> <p>3 of the interest, so they had to pay corporation tax in</p> <p>4 respect of the whole of the interest. Under</p> <p>5 section 240(5), the income tax deducted at source could</p> <p>6 be set off against that corporation tax liability in</p> <p>7 respect of the interest.</p> <p>8 Therefore, if it was interest, it didn't make</p> <p>9 a ha'p'orth of difference to Chevron whether the tax had</p> <p>10 been deducted at source in respect of it because it got</p> <p>11 a complete rebate of that tax against its corporation</p> <p>12 tax liability.</p> <p>13 As far as its financial liability was concerned, the</p> <p>14 fact that tax was deducted at source was neither here</p> <p>15 nor there because it got a complete rebate of that tax</p> <p>16 against its corporation tax liability.</p> <p>17 That is what section 240(5) of the Income and</p> <p>18 Corporation Taxes Act 1970 says.</p> <p>19 MR JUSTICE HILDYARD: So it was, in a sense, packaged as</p> <p>20 a capital sum but in fact it was capable of being broken</p> <p>21 down between capital and income, if you like?</p> <p>22 MR GARDINER: Capital and interest, my Lord, yes.</p> <p>23 MR JUSTICE HILDYARD: Yes.</p> <p>24 MR GARDINER: Yes. The crunch point, as I said, was: was it</p> <p>25 interest? It didn't make a ha'p'orth of difference,</p> <p style="text-align: center;">Page 53</p>	<p>1 recognising that there was a right to interest.</p> <p>2 MR GARDINER: Yes.</p> <p>3 MR JUSTICE HILDYARD: But I don't know whether it is relied</p> <p>4 on for that but we will know that very soon.</p> <p>5 MR GARDINER: But all we do say, whichever view you take</p> <p>6 about that, it is no authority for the present case</p> <p>7 because it is simply a determination that's interest.</p> <p>8 MR JUSTICE HILDYARD: Yes.</p> <p>9 MR GARDINER: I dealt with all those authorities together,</p> <p>10 because I thought it was worthwhile me doing so in the</p> <p>11 sense that they seem, in our respectful submission, to</p> <p>12 be in the same compartment. Barlow, Regal (Hastings),</p> <p>13 Cassels J and that case, insofar as of any relevance.</p> <p>14 I don't really want to say anything more about it.</p> <p>15 I would then like just to refer back to where I had</p> <p>16 got to in the skeleton. I think I can be --</p> <p>17 MR JUSTICE HILDYARD: Is this a good moment for a break or</p> <p>18 are you wanting to wind up fairly quickly?</p> <p>19 MR GARDINER: I could wind up, I think, fairly quickly, my</p> <p>20 Lord. I may be wrong about that. I have taken longer</p> <p>21 than I actually anticipated. But I think in ten</p> <p>22 minutes' time I ought to finish.</p> <p>23 Then I am grateful. Because as far as the rest of</p> <p>24 our skeleton is concerned, we have made our points in</p> <p>25 paragraph 55 about the primary argument. We say it is</p> <p style="text-align: center;">Page 55</p>
<p>1 that's why they didn't argue about yearly interest,</p> <p>2 didn't make a ha'p'orth of difference whether it was</p> <p>3 yearly or any other kind of interest, the crunch point</p> <p>4 was: was it interest at all?</p> <p>5 That's why, as I said, and I haven't shown</p> <p>6 your Lordship the judgment but if we go through it all</p> <p>7 the time, the terminology is: was it interest of money</p> <p>8 within the charging provisions of schedule D?</p> <p>9 MR JUSTICE HILDYARD: I dare say some reliance may be put,</p> <p>10 but I will wait to hear, on 696 at J:</p> <p>11 "Until the courts made an award of interest</p> <p>12 ...(Reading to the words)... and nature of the sum so</p> <p>13 awarded."</p> <p>14 MR GARDINER: What we would say is that that may well be</p> <p>15 correct in establishing that it is interest. It doesn't</p> <p>16 establish that it is yearly interest.</p> <p>17 You can say in this particular case the award, if</p> <p>18 you were to call it that, of statutory interest comes,</p> <p>19 you know, uno flatu on the determination there is</p> <p>20 a surplus.</p> <p>21 MR JUSTICE HILDYARD: It goes to your reveal point, doesn't</p> <p>22 it --</p> <p>23 MR GARDINER: Yes.</p> <p>24 MR JUSTICE HILDYARD: -- that the right to interest arises</p> <p>25 only at the time of judgment, rather than the judgment</p> <p style="text-align: center;">Page 54</p>	<p>1 fraught with practical difficulties.</p> <p>2 If your Lordship has read that, we are just making</p> <p>3 the points there that you are going to get some really</p> <p>4 bizarre results on the Revenue's primary argument.</p> <p>5 I have made the point already that some proofs will be</p> <p>6 dealt with quickly. I am not saying it about this</p> <p>7 particular case because of the size of it. But in the</p> <p>8 ordinary case some proofs will be dealt with more</p> <p>9 quickly than others, on the argument on the other side,</p> <p>10 therefore, they will be not yearly interest; therefore</p> <p>11 others will be yearly interest. Or with the same</p> <p>12 creditor, you may have a payment on account at the</p> <p>13 beginning. That, apparently, is not yearly interest if</p> <p>14 it is less than a year, then subsequent payments will be</p> <p>15 yearly interest.</p> <p>16 You get all these bizarre results that we are</p> <p>17 referring to in paragraph 55 and 56.</p> <p>18 We will say that those are circumstances which one</p> <p>19 needs to take account of and to ask oneself: did</p> <p>20 Parliament really intend to create this interest as</p> <p>21 constituting yearly interest for tax purposes?</p> <p>22 The alternative argument, I am not going to say</p> <p>23 a great deal about, really, at all. My learned friend's</p> <p>24 put it forward with some diffidence in the letter and</p> <p>25 I think in the years I've been in practice, I've always</p> <p style="text-align: center;">Page 56</p>

<p>1 been suspicious of any argument that actually hasn't got 2 any safe ground to start from.</p> <p>3 That is the argument for the alternative here. We 4 saw what it was as an alternative argument put forward, 5 with some diffidence, in the letter, to say "Well, 6 you've got to look at the intention of the parties at 7 the beginning of the administration". Well that's 8 nonsense. My clients didn't have any intention about 9 sort of how long the administration would take or 10 whether it was going to be yearly interest or not. 11 I mean, they were concerned with carrying out their 12 statutory duties.</p> <p>13 It is not a question of the creditor's intention. 14 The creditor, no doubt, would have wanted his money back 15 as soon as possible. It is what Parliament has enacted 16 as the regime that determines the issue. So it is 17 nothing to do with the intentions and the prospects and 18 the possibilities as at the commencement of the 19 administration.</p> <p>20 So that was other argument put forward in the letter 21 of 2 March. Then, of course, the first alternative 22 argument put forward in this particular case now, in the 23 skeleton, is that you have to look at the position 24 immediately after the payment of the debts, immediately 25 after the payment of the 100p in the pound of the debts</p> <p style="text-align: center;">Page 57</p>	<p>1 But as far as we're concerned, we're happy with what 2 we've said in the skeleton in relation to this and 3 I don't think I can really add very much more to it.</p> <p>4 What we do say is what we have in the conclusion at 5 paragraph 64. Perhaps I will just read that. We say it 6 is:</p> <p>7 "Explained about statutory interest ...(Reading to 8 the words)... 2A."</p> <p>9 We then refer to those paragraphs: 10 "Consequently, for the reasons given above 11 ...(Reading to the words)... within the meaning of 12 section 874. There is, as a result, no obligation or 13 entitlement to deduct at source."</p> <p>14 At this particular stage, I would just perhaps 15 remind your Lordship, I am not going to repeat them, but 16 of the five propositions I made yesterday. Those are 17 fundamentally our propositions, our submissions, as to 18 why in this particular case, any statutory interest that 19 is paid out, cannot constitute yearly interest.</p> <p>20 I won't repeat them, because I am sure I noticed 21 that your Lordship made a very accurate note, I'm sure, 22 of those propositions and I don't think it is necessary 23 to repeat them.</p> <p>24 MR JUSTICE HILDYARD: I have the benefit of the transcript. 25 MR GARDINER: Yes, indeed. Yes.</p> <p style="text-align: center;">Page 59</p>
<p>1 and look at it then and see whether from that particular 2 time, you have a year or less, et cetera.</p> <p>3 Again, we would say that can't be right and what on 4 earth is that relying on? Here we have a dispute. It 5 has taken us umpteen months to get to court in respect 6 of this particular dispute, in respect of payment out of 7 the interest. Does it mean that if in every case, the 8 Revenue say "No, no, we don't agree", you have to go to 9 court about it." It takes you sort of seven or eight 10 months to get to court and therefore you can't actually 11 distribute, depending on how long it takes your Lordship 12 to give a judgment, we can't distribute until after 13 12 months, therefore it is yearly interest. If 14 your Lordship had given judgment earlier or we had got 15 to court earlier, it's not yearly interest. It can't 16 turn on issues like that at all. It is a nonsense, 17 frankly. But that is the basis of the alternative 18 argument.</p> <p>19 I don't think we can say very much more about it 20 than what we've actually put in our skeleton argument. 21 If there were any real issues that your Lordship was 22 concerned with on those particular matters, I suspect my 23 learned friend, Mr Bayfield will be the better person to 24 ask them and I am sure if your Lordship did, he would be 25 very happy to deal with it.</p> <p style="text-align: center;">Page 58</p>	<p>1 So I don't think that unless there is anything 2 your Lordship wants to ask me further, I wish to add to 3 what we have in our skeleton argument.</p> <p>4 My Lord, I am obliged.</p> <p>5 MR JUSTICE HILDYARD: Thank you very much. If there were 6 issues of insolvency law practice which arise, then I am 7 grateful for the suggestion that Mr Bayfield could also 8 assist me. But for the moment, I think I will hear 9 Mr Goy, after a short break.</p> <p>10 MR GARDINER: I am obliged, my Lord. 11 (11.36 am) 12 (A short break) 13 (11.44 am)</p> <p>14 Submissions by MR GOY</p> <p>15 MR JUSTICE HILDYARD: Yes, Mr Goy.</p> <p>16 MR GOY: My Lord, before I make my substantive submissions, 17 there is just one small point I wanted to make regarding 18 the Revenue's guidance given in INS 7433.</p> <p>19 MR JUSTICE HILDYARD: Yes.</p> <p>20 MR GOY: There is some suggestion that our position in this 21 case is somehow inconsistent with what was said in that 22 guidance.</p> <p>23 All I was wanting to do was to say that the nature 24 of that guidance is fully explained in the witness 25 statement of Nicola Rass, which is in the first volume</p> <p style="text-align: center;">Page 60</p>

<p>1 of documents, after divider 4. The relevant passage is</p> <p>2 paragraph 24.</p> <p>3 Essentially what Ms Rass says is that this statement</p> <p>4 related to payments made to the Revenue and did not</p> <p>5 relate to payments, generally, of statutory interest.</p> <p>6 She refers, in particular, to the full terms of</p> <p>7 INS7433 which you will find in volume 4, at page 325.</p> <p>8 It's the number on the right-hand side of the page.</p> <p>9 You will see that, these being instructions to</p> <p>10 officials of the Revenue, right at the end it says:</p> <p>11 "Process the full payment with interest through DAS</p> <p>12 at APS and transfer the interest to permanent</p> <p>13 overpayments."</p> <p>14 And she refers to this as effectively indicating</p> <p>15 what this statement was all about.</p> <p>16 In other words -- and I might say that that</p> <p>17 particular sentence is not included in the passage that</p> <p>18 you referred to yesterday in the statement of Mr Downs.</p> <p>19 It is accepted that mistakes were made in this case,</p> <p>20 but it is not accepted that that particular statement in</p> <p>21 those notes was mistaken.</p> <p>22 MR JUSTICE HILDYARD: It was published, was it, in a section</p> <p>23 which made clear that it was internal, rather than</p> <p>24 external?</p> <p>25 MR GOY: I wouldn't go that far.</p> <p style="text-align: center;">Page 61</p>	<p>1 case -- the instance of the HMRC, whether, whatever may</p> <p>2 be the insolvency process, liquidation, bankruptcy,</p> <p>3 administration, then if that process lasts for more than</p> <p>4 a year, any interest payable under the statute is yearly</p> <p>5 interest, for the purpose of the taxing Act.</p> <p>6 MR GOY: That's not quite how I put it. That's to say, when</p> <p>7 other right to interest arises, if when payable, that</p> <p>8 right to interest relates to a period of more than</p> <p>9 a year, it is yearly interest.</p> <p>10 So with the statutory interest that we're looking</p> <p>11 at --</p> <p>12 MR JUSTICE HILDYARD: Yes.</p> <p>13 MR GOY: -- the period of interest will run from the</p> <p>14 commencement of administration --</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR GOY: -- ultimately to the time of full payment of debts.</p> <p>17 That is the crucial period. Interest doesn't run,</p> <p>18 obviously, beyond that period.</p> <p>19 MR JUSTICE HILDYARD: No. But it applies, whatever may be</p> <p>20 the nature of the insolvency process?</p> <p>21 MR GOY: Yes.</p> <p>22 MR JUSTICE HILDYARD: And, for example, in a winding-up, it</p> <p>23 would date back, would it, to the presentation of the</p> <p>24 petition?</p> <p>25 MR GOY: I am slightly diffident in saying too much about</p> <p style="text-align: center;">Page 63</p>
<p>1 MR JUSTICE HILDYARD: No.</p> <p>2 MR GOY: It was published, but in context, as Ms Rass says,</p> <p>3 it related to payments made to the Revenue but was</p> <p>4 misunderstood by certain Revenue officials, who believed</p> <p>5 it had a wider effect.</p> <p>6 MR JUSTICE HILDYARD: I mean, it's not suggested that there</p> <p>7 is no estoppel or otherwise in the proceedings and it is</p> <p>8 accepted that the matter should proceed as a question of</p> <p>9 law and I am content for it to proceed on that footing.</p> <p>10 But if HMRC's own people misinterpreted that, it is</p> <p>11 a danger, is it not, that others, likewise, would have</p> <p>12 misinterpreted it? It is a great source of disquiet if</p> <p>13 these things are published abroad, later relied on by</p> <p>14 other people, and given a scope which was never</p> <p>15 intended.</p> <p>16 MR GOY: Well, my Lord, I have to agree it is unfortunate if</p> <p>17 statements are made that could be misconstrued. That</p> <p>18 must be the case and there clearly were in this case,</p> <p>19 there is no doubt about it.</p> <p>20 The only real point I am making is that we do not</p> <p>21 believe our case is inconsistent with that statement, as</p> <p>22 that statement was intended to apply.</p> <p>23 MR JUSTICE HILDYARD: Yes. So it is HMRC's case, as I think</p> <p>24 was confirmed to me yesterday, that, subject to any</p> <p>25 statutory exceptions and subject to the particular</p> <p style="text-align: center;">Page 62</p>	<p>1 provisions --</p> <p>2 MR JUSTICE HILDYARD: Right, okay.</p> <p>3 MR GOY: -- that I am not familiar with but in principle,</p> <p>4 one would expect that to be so.</p> <p>5 In other words, we say, there is nothing special</p> <p>6 about statutory interest. In a case like this, it could</p> <p>7 be that any interest payable is not yearly -- I mean,</p> <p>8 talking in general terms -- that statutory interest</p> <p>9 payable under the provisions we're looking at is not</p> <p>10 yearly interest. In other cases it may be, and in this</p> <p>11 case, it certainly is.</p> <p>12 MR JUSTICE HILDYARD: Well, David Richards J has said there</p> <p>13 is something peculiar about statutory interest.</p> <p>14 MR GOY: Yes. Can I come back to that?</p> <p>15 MR JUSTICE HILDYARD: Do take your own course Mr Goy, but</p> <p>16 I was just cavilling a little bit about the way you put</p> <p>17 that in terms of focusing on statutory interest.</p> <p>18 I think, unless demonstrated otherwise, statutory</p> <p>19 interest under the insolvency regime is, according to</p> <p>20 David Richards J, a rather different beast than either</p> <p>21 compensatory interest or contractual interest. At the</p> <p>22 moment, you know, at some point, I think that may be the</p> <p>23 bald point, I don't know.</p> <p>24 You know, you deal with it as you would like to.</p> <p>25 MR GOY: I will deal with that specifically, because we do</p> <p style="text-align: center;">Page 64</p>

<p>1 say that essentially, while there is no right to</p> <p>2 interest until a surplus arises, nevertheless one can</p> <p>3 say that there is a contingent right to interest all</p> <p>4 along. And I do make that point and I will refer to</p> <p>5 Riches, actually, which supports that submission.</p> <p>6 MR JUSTICE HILDYARD: Does that entail you saying to me,</p> <p>7 just by way of heads up -- don't elaborate it now, if</p> <p>8 you don't want to -- that I have to part company with</p> <p>9 David Richards J?</p> <p>10 MR GOY: No, no, it doesn't.</p> <p>11 MR JUSTICE HILDYARD: That's by reference to your gloss that</p> <p>12 he didn't mean quite what it is said he meant. He meant</p> <p>13 payment --</p> <p>14 MR GOY: No, ultimately, our case is that you look to the</p> <p>15 position at the time the right to interest arises, that</p> <p>16 is once a surplus is established. If that interest,</p> <p>17 when it becomes payable, relates to a period and is</p> <p>18 payable in respect of a period in excess of a year, that</p> <p>19 is yearly interest.</p> <p>20 So at the end of the day, the nature of the right in</p> <p>21 the meantime is not something that I say is a matter of</p> <p>22 particular concern.</p> <p>23 But I will, in any event, say something about what</p> <p>24 David Richards J said.</p> <p>25 MR JUSTICE HILDYARD: But does the creditor have any</p> <p style="text-align: center;">Page 65</p>	<p>1 MR GOY: I then propose to refer to the authorities on which</p> <p>2 I rely, effectively the three cases which Mr Gardiner</p> <p>3 has already referred to this morning. I am then going</p> <p>4 to refer to, in particular, the Mayor of Gateshead case,</p> <p>5 which is said to be clearly against us and then I am</p> <p>6 going to go on to deal more particularly with the</p> <p>7 arguments of my learned friend.</p> <p>8 MR JUSTICE HILDYARD: Thank you.</p> <p>9 MR GOY: But just by way of outline, if I may put our case,</p> <p>10 we say that whether or not interest is yearly interest</p> <p>11 is determined by reference to the length of the period</p> <p>12 in respect of which the interest is payable.</p> <p>13 Put another way, is it to be paid in respect of</p> <p>14 a year or more?</p> <p>15 We say the test is not whether interest accrues, in</p> <p>16 the sense to which the applicants refer. They say</p> <p>17 interest must accrue over a period, if you remember.</p> <p>18 They say interest does not accrue during a period when</p> <p>19 there is no obligation to pay. Those are the notes</p> <p>20 I have of my learned friend's submissions.</p> <p>21 We say there is no such requirement regarding</p> <p>22 accrual, in the sense to which he refers and we say that</p> <p>23 they elevate what are ordinary features of both interest</p> <p>24 and yearly interest, features that can be said to be</p> <p>25 exhibited in most cases, but they elevate those features</p> <p style="text-align: center;">Page 67</p>
<p>1 right -- again, deal with this in due course -- any</p> <p>2 contingent or other right, whilst the question of there</p> <p>3 will or won't be a surplus is unclear?</p> <p>4 MR GOY: Well, I say the answer to that question isn't</p> <p>5 determinative of this case, but in fact I say that there</p> <p>6 clearly is a contingent right, clearly.</p> <p>7 It doesn't mean an awful lot because you can't sue</p> <p>8 on it. You can't say it accrues. But nevertheless</p> <p>9 there is --</p> <p>10 MR JUSTICE HILDYARD: You can't say it accrues?</p> <p>11 MR GOY: You can't say it accrues, in the sense that, as</p> <p>12 said in the Lehman's decision we've looked at, you</p> <p>13 cannot say on a day-to-day basis that you will have</p> <p>14 an entitlement. So in that sense, you can't say it</p> <p>15 accrues. But you can say it accrues in a conditional</p> <p>16 sense, "If something happens, I will have an entitlement</p> <p>17 to interest, running from a particular time to another</p> <p>18 time."</p> <p>19 So you can call that conditional accrual. You may</p> <p>20 say it is non-accrual. I say it is a sort of accrual</p> <p>21 and that, if I may say so, is very similar to the</p> <p>22 approach adopted by their Lordships in Riches.</p> <p>23 What I propose to do is to make, if I may, certain</p> <p>24 general statements by way of introduction.</p> <p>25 MR JUSTICE HILDYARD: Yes.</p> <p style="text-align: center;">Page 66</p>	<p>1 into a requirement to be satisfied in all cases and we</p> <p>2 say that is wrong and there is no justification for it.</p> <p>3 My Lord, in the ordinary case of a loan, if the</p> <p>4 indebtedness will or may exist for a year or more, the</p> <p>5 interest will clearly be yearly. It will relate to</p> <p>6 a year or more.</p> <p>7 Essentially in such a case, the position is looked</p> <p>8 at at the time of the making of the loan. There seems</p> <p>9 to be no disagreement between us on that.</p> <p>10 In other words, you look to the time when the right</p> <p>11 to interest first arises, not to the time of payment but</p> <p>12 when the right first arises, and you look then, to see</p> <p>13 the length or intended length of the indebtedness. That</p> <p>14 is essentially what you do in the case of an ordinary</p> <p>15 loan.</p> <p>16 You look at the position, if I can put it like this,</p> <p>17 prospectively.</p> <p>18 But there are cases, such as the present, where,</p> <p>19 when the right to interest arises, the interest is not</p> <p>20 to be paid as to the future, as to any future</p> <p>21 indebtedness, it is payable as to the past, as to a past</p> <p>22 indebtedness, if you like, or maybe an indebtedness that</p> <p>23 is only then determined to arise, as in the compensation</p> <p>24 cases.</p> <p>25 We say that if the period in respect of which the</p> <p style="text-align: center;">Page 68</p>

<p>1 interest is paid is a year or more, it is yearly</p> <p>2 interest.</p> <p>3 MR JUSTICE HILDYARD: So the length of indebtedness is</p> <p>4 a sufficient?</p> <p>5 MR GOY: Yes.</p> <p>6 MR JUSTICE HILDYARD: I understand them to say it is</p> <p>7 necessary but they do not say it is sufficient.</p> <p>8 MR GOY: We say it is sufficient. If the interest is paid</p> <p>9 in respect of an indebtedness that, looking</p> <p>10 prospectively in the case of an ordinary loan, is or may</p> <p>11 be more than a year, that is yearly interest.</p> <p>12 In the case of interest that is paid, if you like,</p> <p>13 as to the past, you simply look to the period in respect</p> <p>14 of which the interest is payable.</p> <p>15 MR JUSTICE HILDYARD: So recurrence is nothing to do with</p> <p>16 it?</p> <p>17 MR GOY: I will come back to that, my Lord.</p> <p>18 MR JUSTICE HILDYARD: Right.</p> <p>19 MR GOY: I say recurrence has a lot to do with it, in the</p> <p>20 sense that it is an element before interest can be</p> <p>21 interest, that there is an element of recurrence. There</p> <p>22 is sufficient element in this case and in all the</p> <p>23 compensation cases, a sufficient element of recurrence</p> <p>24 that satisfies any such requirement.</p> <p>25 If there is no recurrence, there is no interest for</p> <p style="text-align: center;">Page 69</p>	<p>1 MR JUSTICE HILDYARD: Right. So you don't have to know --</p> <p>2 MR GOY: You only look at it when interest has to be paid</p> <p>3 and you know what that is because you're going to pay</p> <p>4 it.</p> <p>5 MR JUSTICE HILDYARD: So the obligation to deduct relates</p> <p>6 only to the amount actually paid and not to the amount</p> <p>7 struck at the time that the surplus is established.</p> <p>8 MR GOY: It's an obligation to deduct from the payment made.</p> <p>9 What I was proposing to do was to refer you</p> <p>10 straightaway to the three cases on which we rely,</p> <p>11 Barlow, Regal (Hastings) and Jefford v Gee.</p> <p>12 Now, the point made by Mr Gardiner in respect of</p> <p>13 both, in particular, Barlow and Regal (Hastings) is that</p> <p>14 he says: well, that was a case where there was some</p> <p>15 right to interest right from the beginning.</p> <p>16 I rely on these cases for the proposition that in</p> <p>17 all of them, the right to interest only accrued, if you</p> <p>18 like, at the end of the day, be it of the deed in Barlow</p> <p>19 or the court order in Regal (Hastings) or the court</p> <p>20 order in Jefford v Gee.</p> <p>21 I say that when that right arose, interest was</p> <p>22 payable in respect of a past period that in all cases,</p> <p>23 exceeded a year. In all these cases, the interest was</p> <p>24 held to be yearly interest and I say the same thing goes</p> <p>25 in this case, for the same reasons.</p> <p style="text-align: center;">Page 71</p>
<p>1 tax purposes. There has to be an element of recurrence</p> <p>2 but I will come back, if I may, to what that element</p> <p>3 amounts to. It relates more to the quality of the</p> <p>4 payment than the fact that you may have to pay interest</p> <p>5 on more than one occasion, for example.</p> <p>6 So we say in the present case, the right to interest</p> <p>7 arises when all the debts have been repaid and a surplus</p> <p>8 has been identified in the administration.</p> <p>9 When it arises, the interest is payable on the facts</p> <p>10 of this case at any event, in respect of a period in</p> <p>11 excess of a year, therefore it is yearly interest.</p> <p>12 The company went into administration in 2008 and no</p> <p>13 debts were paid to unsecured creditors until 2012.</p> <p>14 MR JUSTICE HILDYARD: Again, in your own time but one of the</p> <p>15 things that is floating through my mind is when you do</p> <p>16 the deduction, do you do it according to the paper right</p> <p>17 or according to the actual right? It is not impossible</p> <p>18 that the anticipated surplus suddenly shrinks. I don't</p> <p>19 know, something ghastly happens in the market. Then,</p> <p>20 although creditors will have worked out their</p> <p>21 entitlements, say, at 8 per cent, their entitlements</p> <p>22 cannot be met in full.</p> <p>23 MR GOY: What you do is you look to the payment of interest,</p> <p>24 whatever that happens to turn out to be, and you then</p> <p>25 say "Well, to what period does it relate?"</p> <p style="text-align: center;">Page 70</p>	<p>1 But what's said against me, in particular, regarding</p> <p>2 Barlow and Regal (Hastings), if I understood what</p> <p>3 Mr Gardiner was saying this morning, was that he was</p> <p>4 suggesting in these cases, that there was right from</p> <p>5 inception, an obligation to pay interest, i.e. that</p> <p>6 obligation arose from the time of the breach in Barlow</p> <p>7 and also the time of the breach in Regal (Hastings).</p> <p>8 That's what I understood him to say.</p> <p>9 Our position on that is that, merely because there</p> <p>10 is a breach of trust, a breach of fiduciary duty, that</p> <p>11 does not give any necessary right to interest, certainly</p> <p>12 not at the time of these cases. That's to say, whether</p> <p>13 a right to interest could arise under the court's</p> <p>14 equitable jurisdiction or whether it could arise under</p> <p>15 the Law Reform Act, in all these cases, the award of</p> <p>16 interest was at the court's discretion.</p> <p>17 Now, this is not an area of the law which I carry</p> <p>18 around in the top of my head, but Ms Addy has been very</p> <p>19 helpful and she has referred me to a passage in the</p> <p>20 White Book which I haven't been able to show to anybody</p> <p>21 else. But I will refer you, if I may, to volume 1,</p> <p>22 paragraph 7.0.8, which gives the history and the basic</p> <p>23 law relating to claims for interest.</p> <p>24 (Pause)</p> <p>25 The basic point I make arising out of those</p> <p style="text-align: center;">Page 72</p>

<p>1 paragraphs and the references that are made, are that</p> <p>2 the references are to powers to award interest. So we</p> <p>3 simply do not accept that as regards Barlow and</p> <p>4 Regal (Hastings), that these were cases of existing</p> <p>5 liabilities to pay interest arising as at, if you like,</p> <p>6 inception.</p> <p>7 We take and took the position to be that referred to</p> <p>8 in Regal (Hastings), in fact. That report is after</p> <p>9 divider 41.</p> <p>10 MR JUSTICE HILDYARD: In Regal (Hastings)?</p> <p>11 MR GOY: Yes, we took the position -- it is after</p> <p>12 divider 41. We took the position from the paragraph to</p> <p>13 which your Lordship has already referred, in fact, on</p> <p>14 page 300. This is a case of interest which nobody knew</p> <p>15 would be payable and the rate of which was unknown until</p> <p>16 the House of Lords gave its decision and indicated the</p> <p>17 rate:</p> <p>18 "I do not think the amount of interest became due</p> <p>19 until the date of that decision."</p> <p>20 So we do not accept the comments of the applicants</p> <p>21 regarding Barlow and Regal (Hastings), that these were</p> <p>22 simply cases of an existing liability to pay interest,</p> <p>23 if you like, being crystallised by the order of the</p> <p>24 court or by the deed. We don't accept that.</p> <p>25 If I may ask you fairly quickly to look at Barlow,</p> <p style="text-align: center;">Page 73</p>	<p>1 He said that:</p> <p>2 "I have to deal with the facts of this case, where</p> <p>3 the House of Lords has held in 1942 that the defendants,</p> <p>4 the directors, are to be treated as having had, each of</p> <p>5 them, since 1935, the sum of £1,402 in trust for the</p> <p>6 plaintiff and that the directors must be taken to have</p> <p>7 invested at the moment they receive it and therefore</p> <p>8 must pay interest from that moment, to the time six and</p> <p>9 a half years later, when the House of Lords declared the</p> <p>10 defendants liable. I think these facts distinguish this</p> <p>11 case from such a case as Goslings which dealt with</p> <p>12 bankers' short loans."</p> <p>13 Then there is the passage we've already looked at</p> <p>14 towards the end.</p> <p>15 What I would say is that in determining that the</p> <p>16 interest was yearly interest, the apparent crucial</p> <p>17 factor was the length of time in respect of which the</p> <p>18 interest was payable. That seems to be the only real</p> <p>19 factor that the judge refers to.</p> <p>20 There is no reference to whether interest accrues,</p> <p>21 in any sense. Had it been a requirement of interest to</p> <p>22 be yearly interest, as the applicants suggest, this</p> <p>23 interest clearly would not have been yearly interest.</p> <p>24 The reference is, rather, to the period in respect of</p> <p>25 which when it became due -- when the right accrued, if</p> <p style="text-align: center;">Page 75</p>
<p>1 divider 39. It is really page 8 and the paragraph at</p> <p>2 the bottom of the page. (Pause)</p> <p>3 There was, to put it mildly, little reasoning in</p> <p>4 this decision. But the factual point is stark. What</p> <p>5 the court was looking at was interest payable under the</p> <p>6 deed and under the deed, interest was payable from the</p> <p>7 period 1923 to 1930.</p> <p>8 So we say that the factual position is similar to</p> <p>9 the position in the present case. When the right to</p> <p>10 interest arose, it related to a period prior to the time</p> <p>11 at which that right arose. That period exceeded a year</p> <p>12 and it was held to be yearly interest.</p> <p>13 The only other point I would make is that in looking</p> <p>14 at that paragraph, there is no reference to any</p> <p>15 requirement of accrual or the like, and there is no</p> <p>16 reference to any requirement of accrual or the like in</p> <p>17 any of the three cases I am referring your Lordship to.</p> <p>18 Regal (Hastings), after divider 41:</p> <p>19 "Was the interest, yearly interest, when payable in</p> <p>20 respect of the period from 1935 to 1942?"</p> <p>21 The relevant paragraphs are at page 299. You will</p> <p>22 see that second full paragraph, "Mr Beney contended",</p> <p>23 and he refers to re Cooper and Gateshead. He says:</p> <p>24 "I don't think either of those cases are helpful or</p> <p>25 very helpful."</p> <p style="text-align: center;">Page 74</p>	<p>1 you like, when the right arose, the reference to the</p> <p>2 period in respect of which it was payable and that was</p> <p>3 all.</p> <p>4 MR JUSTICE HILDYARD: You don't read it as some support for</p> <p>5 the investment quality?</p> <p>6 MR GOY: Well --</p> <p>7 MR JUSTICE HILDYARD: We're operating in equity and what the</p> <p>8 learned judge appealing from the Queen's Bench says is</p> <p>9 that, as it was held on trust, the directors must be</p> <p>10 taken to have invested it at the moment they received it</p> <p>11 and therefore must pay interest from that moment, to the</p> <p>12 time six and a half years later.</p> <p>13 So you're to imagine the directors not being allowed</p> <p>14 by equity to say other than that they were investing on</p> <p>15 the beneficiaries' behalf and must account for it.</p> <p>16 MR GOY: Yes, but there is no reference here, as to whether</p> <p>17 they did that or not.</p> <p>18 MR JUSTICE HILDYARD: No. But in the eyes of the equity, it</p> <p>19 wouldn't matter whether they did or not. They are just</p> <p>20 not allowed to say either that they defaulted in terms</p> <p>21 of an investment or that they made an investment on</p> <p>22 their own account. One way or the other, they must</p> <p>23 cough up.</p> <p>24 MR GOY: But at the end of the day, whether they have to</p> <p>25 cough up or not, would depend upon the order of the</p> <p style="text-align: center;">Page 76</p>

<p>1 court and the court then made an order that interest was</p> <p>2 payable in respect of a certain period. The judge may</p> <p>3 have explained it as he did but at the end of the day,</p> <p>4 he was saying "Now we make the order, you have got to</p> <p>5 compensate and you've got to compensate and provide</p> <p>6 compensation to include interest that could have been</p> <p>7 earned".</p> <p>8 MR JUSTICE HILDYARD: You see, in the compensation cases,</p> <p>9 I can understand more clearly, the discretionary aspect.</p> <p>10 In the trust cases, I find it difficult to fully get my</p> <p>11 mind around the possibility that the court would have</p> <p>12 allowed the trustee, under any circumstances, to retain</p> <p>13 a benefit or assert a breach of trust.</p> <p>14 MR GOY: Well, yes, but that's assuming that a benefit was</p> <p>15 obtained.</p> <p>16 MR JUSTICE HILDYARD: Well if it wasn't --</p> <p>17 MR GOY: This all --</p> <p>18 MR JUSTICE HILDYARD: -- they didn't do what they should</p> <p>19 have done which is to invest trust monies and therefore</p> <p>20 must account for it.</p> <p>21 MR GOY: But in any event, whatever scenario, the question</p> <p>22 is when the obligation to compensate arose.</p> <p>23 This case clearly indicates that in the view of the</p> <p>24 judge, that that obligation to compensate only arose at</p> <p>25 the end of the day. In particular, there could have</p> <p style="text-align: center;">Page 77</p>	<p>1 date of the breach, unless there is an exception to it.</p> <p>2 MR GOY: These are cases -- certainly the cases we're</p> <p>3 looking at -- where the court did have a discretion.</p> <p>4 There was no right, absent the court order.</p> <p>5 MR JUSTICE HILDYARD: That's what I am trying to get my mind</p> <p>6 round in the equitable context. It seems to me that in</p> <p>7 equity there is a right because it is impossible for the</p> <p>8 directors or trustees to assert that they are entitled</p> <p>9 to retain and it's a breach of trust for them to say</p> <p>10 that they didn't generate interest. One way or the</p> <p>11 other, they are going to either have to cough up or</p> <p>12 account.</p> <p>13 MR GOY: But ultimately that has to depend upon the order of</p> <p>14 the court.</p> <p>15 MR JUSTICE HILDYARD: Yes, because they --</p> <p>16 MR GOY: If the courts had, if you like, no discretion,</p> <p>17 I see the point. But where the court has a discretion,</p> <p>18 one cannot say "Ah, well, I am entitled to interest".</p> <p>19 All you can say is "Well, I probably will get interest</p> <p>20 because probably the court will exercise its</p> <p>21 discretion".</p> <p>22 MR JUSTICE HILDYARD: That's why I am having difficulty, but</p> <p>23 I may be wrong about this. I can understand that until</p> <p>24 you have the court saying there was a breach of trust,</p> <p>25 obviously your rights are there but they have to be</p> <p style="text-align: center;">Page 79</p>
<p>1 been no accruing right to interest in the intermediate</p> <p>2 period. I say that because otherwise this will make</p> <p>3 little sense of what the judge said right at the end of</p> <p>4 his judgment.</p> <p>5 He says:</p> <p>6 "I do not think the amount of interest became due.</p> <p>7 This is a case of interest which nobody knew would be</p> <p>8 payable."</p> <p>9 So we say this is a case where, like the present,</p> <p>10 the right to interest only arose at the end of the day.</p> <p>11 It didn't exist before. A contingent right, the</p> <p>12 possibility of obtaining interest, certainly did exist.</p> <p>13 But the actual right didn't exist until the end of the</p> <p>14 day, just as here. But when the right arose</p> <p>15 unconditionally, if you like, it related back to</p> <p>16 a period of in excess of a year and that seems to be the</p> <p>17 factor that the judge saw was crucial in determining</p> <p>18 that it was yearly interest.</p> <p>19 MR JUSTICE HILDYARD: Isn't that the same with all judicial</p> <p>20 decisions, to some extent? Take the ordinary decision</p> <p>21 of a breach of contract. It is quite right that you</p> <p>22 can't enforce any damages or interest claim in respect</p> <p>23 of breach of contract until you've established it. It's</p> <p>24 true in that sense, but nevertheless, it is trite that</p> <p>25 the breach date rule means that you're entitled from the</p> <p style="text-align: center;">Page 78</p>	<p>1 revealed. Once they are revealed, in the equitable</p> <p>2 context, I can't myself see that there is discretion.</p> <p>3 It seems to me that the rule of equity is "cough up".</p> <p>4 MR GOY: Yes. Two points I would make. I say that that</p> <p>5 right only crystallises as at the time the court makes</p> <p>6 the order. I also say that in the prior period, what</p> <p>7 cannot be said is that there is an entitlement to</p> <p>8 interest. You don't know.</p> <p>9 So that on the argument of Mr Gardiner, because you</p> <p>10 don't know, because ultimately, it is conditional upon</p> <p>11 the discretion of the court, on his argument, there is</p> <p>12 no accrual and therefore that interest cannot be yearly</p> <p>13 interest. That was what he said. If there's</p> <p>14 conditionality, if a condition has to be satisfied</p> <p>15 before you can get the interest, it is not yearly</p> <p>16 interest, he said, and we don't accept that. We say</p> <p>17 these cases don't support that proposition.</p> <p>18 MR JUSTICE HILDYARD: I agree with you there. I have</p> <p>19 a sneaking feeling that the question may very well come</p> <p>20 down to whether David Richards J's analysis is</p> <p>21 applicable.</p> <p>22 MR GOY: I am --</p> <p>23 MR JUSTICE HILDYARD: He just says "I am not going to adopt</p> <p>24 the usual common law or equitable rule because that's</p> <p>25 not the structure of the statutory interest right. The</p> <p style="text-align: center;">Page 80</p>

<p>1 statutory interest right is something that comes in and</p> <p>2 only exists as at the date of the surplus</p> <p>3 identification." And there is no question of</p> <p>4 appropriation before that date to one debt or the other</p> <p>5 in respect of interest or capital because there was no</p> <p>6 right of interest.</p> <p>7 MR GOY: But if we move on to the third case, if you like,</p> <p>8 Jefford v Gee --</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 MR GOY: -- there could be no entitlement in that case until</p> <p>11 the court made an order for damages.</p> <p>12 MR JUSTICE HILDYARD: Yes.</p> <p>13 MR GOY: There could be no entitlement to interest until</p> <p>14 that point in time. To say that at a prior time "Ah,</p> <p>15 well, I could sue for interest. I had a right,</p> <p>16 an unconditional right to interest", would simply be</p> <p>17 wrong.</p> <p>18 MR JUSTICE HILDYARD: Though, on that footing, your thesis</p> <p>19 is that Lord Denning was being uncharacteristically</p> <p>20 restrained, because on your case, it was as easy as pie.</p> <p>21 MR GOY: Yes.</p> <p>22 MR JUSTICE HILDYARD: And it was sort of bewildering that he</p> <p>23 said it was complex, bewildering that he declined to</p> <p>24 answer it. The answer stared him in the face.</p> <p>25 MR GOY: The question as to whether or not there should be</p> <p style="text-align: center;">Page 81</p>	<p>1 He doesn't say six months, I might point out:</p> <p>2 "... for two, three or four years, the interest is</p> <p>3 subject to tax because it is yearly interest of money."</p> <p>4 Then he refers to Riches, and I will come back to</p> <p>5 that.</p> <p>6 Then he goes on. But the point that we make is that</p> <p>7 again, essentially, this is a case where the right to</p> <p>8 interest could only arise on the court making the order.</p> <p>9 This was an order made under the Law Reform Act.</p> <p>10 MR JUSTICE HILDYARD: Yes.</p> <p>11 MR GOY: And those provisions are set out on page 131.</p> <p>12 We say this is a case where the right to interest</p> <p>13 could only arise on the court order and it didn't exist</p> <p>14 before.</p> <p>15 Lord Denning simply says it is yearly interest, by</p> <p>16 reference to the period referred to:</p> <p>17 "Interest on debt or damages for two, three or four</p> <p>18 years."</p> <p>19 He is referring to the period in respect of which</p> <p>20 interest is payable.</p> <p>21 We say, again, this is effectively on all fours with</p> <p>22 our case, a right to interest accrues, a right to</p> <p>23 interest arises, and when it arises, it relates to</p> <p>24 a past period of more than a year.</p> <p>25 So we say this indicates that the status of the</p> <p style="text-align: center;">Page 83</p>
<p>1 deduction is not entirely clear because that depends</p> <p>2 upon working out whether payments are made or not out</p> <p>3 of --</p> <p>4 MR JUSTICE HILDYARD: But he said that interest would be</p> <p>5 payable but the question was, should it be deducted by</p> <p>6 the payee or the payer. That was the question he</p> <p>7 ducked.</p> <p>8 MR GOY: Yes.</p> <p>9 MR JUSTICE HILDYARD: But on your analysis, and one doesn't</p> <p>10 recall Lord Denning being particularly restrained in</p> <p>11 giving an answer which he thought was necessary, he just</p> <p>12 says "It is too difficult for me".</p> <p>13 MR GOY: Yes, but he didn't find it difficult to say it was</p> <p>14 yearly interest.</p> <p>15 MR JUSTICE HILDYARD: Right.</p> <p>16 MR GOY: If we turn to that, perhaps.</p> <p>17 MR JUSTICE HILDYARD: Yes.</p> <p>18 MR GOY: It is divider 45.</p> <p>19 Really it is the paragraphs we've looked at on</p> <p>20 page 149.</p> <p>21 MR JUSTICE HILDYARD: Yes.</p> <p>22 MR GOY: When he says:</p> <p>23 "When the court awards interest on debt or damages</p> <p>24 for [and I will come back to this] two, three or four</p> <p>25 years ..."</p> <p style="text-align: center;">Page 82</p>	<p>1 interest as yearly interest is seemingly determined</p> <p>2 simply by reference to the period in respect of which</p> <p>3 the interest is payable.</p> <p>4 Just one point by way of an aside. He clearly</p> <p>5 refers to periods in excess of a year. He refers to</p> <p>6 "interest on debt or damages for two, three or four</p> <p>7 years."</p> <p>8 MR JUSTICE HILDYARD: Yes.</p> <p>9 MR GOY: So it can't be, I think, inferred from this, that</p> <p>10 he was thinking that: well, any interest payable under</p> <p>11 these statutory provisions, will be yearly interest.</p> <p>12 Had he been thinking that, it is a bit difficult to</p> <p>13 see why he would have referred to "two, three or four",</p> <p>14 rather than any period.</p> <p>15 The only point I make, really, as an aside is that</p> <p>16 simply looking at this decision, I would say that if in</p> <p>17 fact interest was payable under the provisions in</p> <p>18 question, in respect of a period of less than a year,</p> <p>19 the interest would not have been yearly and there is</p> <p>20 nothing in this decision to indicate the contrary.</p> <p>21 So we say this will be an example of where statutory</p> <p>22 interest could in some cases be yearly interest, and in</p> <p>23 other cases, not.</p> <p>24 It is correct that the reference to Riches was</p> <p>25 misplaced. We accept that. And we accept that Riches,</p> <p style="text-align: center;">Page 84</p>

<p>1 which is a case I am going to come on to shortly, is</p> <p>2 authority for interest payable in like circumstances to</p> <p>3 that contemplated in Jefford v Gee, being interest for</p> <p>4 tax purposes, not that it is yearly interest.</p> <p>5 But despite this, I would say there is no reason to</p> <p>6 believe that Lord Denning was, for example, confusing</p> <p>7 interest and yearly interest. That appears from the</p> <p>8 fact that he refers to "debt or damages for two, three,</p> <p>9 or four years". In the next paragraph he refers to:</p> <p>10 "If the person who pays the ..."</p> <p>11 MR JUSTICE HILDYARD: Which paragraph?</p> <p>12 MR GOY: Sorry, this is page 149.</p> <p>13 MR JUSTICE HILDYARD: Thank you.</p> <p>14 MR GOY: Under "5. There are special provisions":</p> <p>15 "For instance, if the person who pays the interest</p> <p>16 is a company or a local authority, it must deduct tax</p> <p>17 (see section 26 of the 1969 Act)."</p> <p>18 Well that's an obligation that only exists in</p> <p>19 respect of yearly interest. So everything is attuned to</p> <p>20 him referring to yearly interest.</p> <p>21 Again, as an aside, Lord Denning had been the judge</p> <p>22 in an earlier case, which is Corinthian Securities.</p> <p>23 MR JUSTICE HILDYARD: Yes.</p> <p>24 MR GOY: Which is after divider 44, which concerned the</p> <p>25 general question whether interest was yearly interest or</p> <p style="text-align: center;">Page 85</p>	<p>1 interest, in part.</p> <p>2 MR GOY: Well, I read that as it is only compulsory to award</p> <p>3 interest on judgments and I will come back to that in</p> <p>4 a moment:</p> <p>5 "When interest is awarded on a judgment, tax is</p> <p>6 payable on it."</p> <p>7 I didn't and I don't read from that, that the award</p> <p>8 of interest is compulsory.</p> <p>9 MR JUSTICE HILDYARD: You see --</p> <p>10 MR GOY: If I may --</p> <p>11 MR JUSTICE HILDYARD: -- at 138C:</p> <p>12 "The plaintiff respondent adopted and repeated</p> <p>13 a number of the submissions ...(Reading to the words)...</p> <p>14 is to make mandatory, the award of interest on damages."</p> <p>15 MR GOY: Yes, the actual provisions are on page 131.</p> <p>16 MR JUSTICE HILDYARD: Yes.</p> <p>17 MR GOY: I think the position looked pretty clear there.</p> <p>18 That's to say that under the original Act, there was</p> <p>19 a general discretion.</p> <p>20 MR JUSTICE HILDYARD: Yes.</p> <p>21 MR GOY: And then under the 1969 Act --</p> <p>22 MR JUSTICE HILDYARD: The AJA.</p> <p>23 MR GOY: Yes. Interest had to be awarded unless there were</p> <p>24 special reasons to the contrary.</p> <p>25 MR JUSTICE HILDYARD: Right.</p> <p style="text-align: center;">Page 87</p>
<p>1 not.</p> <p>2 So any suggestion which has not, by the way, been</p> <p>3 made, that somehow Lord Denning was in complete</p> <p>4 confusion as to the difference between "interest" and</p> <p>5 "yearly interest", I say would be wrong.</p> <p>6 But I do accept that the reference to Riches is</p> <p>7 inaccurate.</p> <p>8 MR JUSTICE HILDYARD: In Jefford v Gee there was a dust up</p> <p>9 between the contesting parties as to whether in the</p> <p>10 particular context of damages, interest was or wasn't</p> <p>11 discretionary, and the decision of the Court of Appeal</p> <p>12 appears to have been that it was mandatory and that's</p> <p>13 why you see at 150 at F:</p> <p>14 "It is only compulsory to award interest on</p> <p>15 judgments. When interest is awarded on a judgment, tax</p> <p>16 is payable on it. It's very different with</p> <p>17 settlements."</p> <p>18 And you can see the argument of counsel.</p> <p>19 MR GOY: I'm sorry, my Lord, can I just ask --</p> <p>20 MR JUSTICE HILDYARD: I'm so sorry, 150 at F.</p> <p>21 That seems to be an answer to the dispute which had</p> <p>22 arisen, as to whether it was discretionary or not. The</p> <p>23 answer appears to be that once you've established</p> <p>24 damage, then it is mandatory to award interest and you</p> <p>25 can't sort of wrap it all up as a capital sum, it is</p> <p style="text-align: center;">Page 86</p>	<p>1 MR GOY: I don't think there can be any dispute as to what</p> <p>2 was happening there.</p> <p>3 MR JUSTICE HILDYARD: Under the AJA, they are mandatory?</p> <p>4 MR GOY: Yes, subject to special circumstances.</p> <p>5 MR JUSTICE HILDYARD: Yes.</p> <p>6 MR GOY: But the point is still that, whether that is so or</p> <p>7 not, no right could be said to exist until the court</p> <p>8 made the award of damages because interest was only</p> <p>9 payable on the damages. Therefore, there had to be</p> <p>10 an award before there could be an entitlement. Until</p> <p>11 that time, the best you could say is that "Well, I have</p> <p>12 a claim and I have the prospect of obtaining</p> <p>13 compensation, together with interest on it". But to say</p> <p>14 there was any form of unconditional entitlement, I would</p> <p>15 say would be an entire exaggeration.</p> <p>16 MR JUSTICE HILDYARD: Can't interest run on an unliquidated</p> <p>17 sum?</p> <p>18 MR GOY: Well, everything runs, looked at retrospectively.</p> <p>19 Once you know you have the right, then you can work out</p> <p>20 what it amounts to.</p> <p>21 MR JUSTICE HILDYARD: Right.</p> <p>22 MR GOY: But you have to have the right to begin with, and</p> <p>23 this case is a case where there was no right until the</p> <p>24 court made the order. When the court made the order,</p> <p>25 what Lord Denning's judgment contemplates is that</p> <p style="text-align: center;">Page 88</p>

<p>1 interest will be payable in respect of a period of</p> <p>2 years, looking backwards, therefore yearly interest.</p> <p>3 I am going to come to this in a moment but there is</p> <p>4 some suggestion that somehow this was some form of</p> <p>5 conflict between this decision and the earlier case of</p> <p>6 re Cooper, on judgment debts. But I will come to that</p> <p>7 in a bit more detail in a moment. But there, the</p> <p>8 interest on judgment debts is, if you like, interest</p> <p>9 looking forward. A judgment is given and interest is</p> <p>10 payable as to the future, to the extent to which it is</p> <p>11 not honoured immediately, as opposed to in this sort of</p> <p>12 case, where we're looking, if you like, backwards, to</p> <p>13 what interest earned in respect of an earlier period.</p> <p>14 What I say about all of these cases is that they are</p> <p>15 consistent with what I say is the position that is to be</p> <p>16 applied in the present case.</p> <p>17 You look at the time the right to interest arises.</p> <p>18 You then ask: is the interest payable in respect of the</p> <p>19 period of a year or more? If the answer is "yes", it is</p> <p>20 yearly interest, and in this case it is.</p> <p>21 I would stress that in none of these cases is there</p> <p>22 any reference to the concept of accrual as being</p> <p>23 relevant. We say that if accrual was required in the</p> <p>24 way Mr Gardiner has suggested it is required, then none</p> <p>25 of the interest that was paid in these cases, would be</p> <p style="text-align: center;">Page 89</p>	<p>1 So we say that all of these cases, all these three</p> <p>2 cases support our argument that if interest when it</p> <p>3 falls due -- if I can put it this way, interest, if,</p> <p>4 when the right to it first arises, is payable in respect</p> <p>5 of a period of more than a year, it is yearly interest.</p> <p>6 This the applicants deny and they say, "Well, you</p> <p>7 don't simply look back at the period of indebtedness and</p> <p>8 say: well, if it is a year or more, it is yearly</p> <p>9 interest". And they refer, in particular, to the Mayor</p> <p>10 of Gateshead case.</p> <p>11 If I could ask your Lordship to turn to that. It is</p> <p>12 divider 36.</p> <p>13 You have been taken through this case, so I can just</p> <p>14 refer you to a couple of passages. Page 889, right at</p> <p>15 the bottom, he refers to re Cooper and says:</p> <p>16 "I am unable to see how the words 'yearly interest'</p> <p>17 can apply to this transaction. There is no agreement</p> <p>18 for a short loan or a long loan. The debt is due and</p> <p>19 repayment is not enforced. Only in that sense is there</p> <p>20 a loan. Truly speaking, there is simply a forbearance</p> <p>21 to put in suit, the remedy for a debt. The repayment</p> <p>22 might have been enforced at any moment.</p> <p>23 "The debt might have been paid by the debtor at any</p> <p>24 moment. It carried interest at law."</p> <p>25 He says:</p> <p style="text-align: center;">Page 91</p>
<p>1 yearly interest.</p> <p>2 Because he says that interest is only yearly</p> <p>3 interest if it accrues over a period. It does not</p> <p>4 accrue if you have, effectively, no present right to sue</p> <p>5 for it.</p> <p>6 We say that in none of the cases would there be</p> <p>7 an obligation to pay interest prior to either the</p> <p>8 entering into the deed or the court order. The prospect</p> <p>9 of having to pay interest existed in all such cases, but</p> <p>10 an obligation did not exist.</p> <p>11 MR JUSTICE HILDYARD: They did have a present right to sue</p> <p>12 for it?</p> <p>13 MR GOY: No, they didn't. In none of these cases.</p> <p>14 MR JUSTICE HILDYARD: Well, they did sue.</p> <p>15 MR GOY: Sorry --</p> <p>16 MR JUSTICE HILDYARD: Their claim --</p> <p>17 MR GOY: They had no present right to claim interest because</p> <p>18 at the time prior to the deed or the court order, it</p> <p>19 could not be said that they had an obligation. They</p> <p>20 might or might not.</p> <p>21 In all cases it -- well, taking the court order</p> <p>22 cases, perhaps they are the easiest ones, that</p> <p>23 obligation would depend upon the court making an order</p> <p>24 as to effective damages -- or actually damages in both</p> <p>25 cases.</p> <p style="text-align: center;">Page 90</p>	<p>1 "The fact that the rate of interest is calculable at</p> <p>2 an annual figure is, as is pointed out in Goslings v</p> <p>3 Blake, immaterial. The debt here was well secured and</p> <p>4 the creditor, unlike the creditor in re Cooper, did not</p> <p>5 desire, immediately, to enforce payment of it. Not</p> <p>6 yearly interest."</p> <p>7 So in that case the interest was categorised quite</p> <p>8 simply by reference to the fact that the debt to which</p> <p>9 it related was repayable on demand.</p> <p>10 There was no agreement for a short loan or long</p> <p>11 loan. The debt is due and the payment is not enforced.</p> <p>12 That was the position when the debt first came into</p> <p>13 existence and when the obligation to pay interest first</p> <p>14 arose. So looking at the position at that time, there</p> <p>15 was an obligation to pay interest in respect of a debt</p> <p>16 which was repayable on demand. Impossible to</p> <p>17 characterise that as yearly interest. It had no</p> <p>18 relationship to a year at all.</p> <p>19 We say that once that characterisation occurs,</p> <p>20 that's the end of it, unless there's some other change</p> <p>21 of circumstances. But the change of circumstances is</p> <p>22 not simply delay in payment.</p> <p>23 Here, on the other hand, the interest is payable,</p> <p>24 looked at at the time the right arises, in respect of</p> <p>25 a period in excess of a year. There is a direct link</p> <p style="text-align: center;">Page 92</p>

<p>1 between the obligation to pay interest and to a period</p> <p>2 in excess of a year.</p> <p>3 Therefore, the position is quite different to that</p> <p>4 in Gateshead.</p> <p>5 Now, the contrast between --</p> <p>6 MR JUSTICE HILDYARD: Why is there a direct link with the</p> <p>7 period in excess of a year?</p> <p>8 MR GOY: Because in this case, the interest is payable when</p> <p>9 the right arises in respect of the period from the</p> <p>10 commencement of the administration, until the payment or</p> <p>11 repayment of the debts in the course of the</p> <p>12 administration. In this case, that period was in all</p> <p>13 circumstances, more than a year. No unsecured debtors</p> <p>14 were repaid until 2012.</p> <p>15 MR JUSTICE HILDYARD: Isn't it exactly the same? The only</p> <p>16 relationship with the period of the year is the length</p> <p>17 of time it takes them to actually get their money.</p> <p>18 There is nothing equivalent to a loan of a year or more</p> <p>19 here, just as there wasn't in Gateshead. The only</p> <p>20 relevance of the year is that because of the insolvency</p> <p>21 process in this case and because of the forbearance in</p> <p>22 the other case, they didn't get their money.</p> <p>23 MR GOY: Yes, but when the right arose, it did relate to</p> <p>24 a period of more than a year, in our case. Whereas in</p> <p>25 Gateshead, when the right arose, you couldn't say that</p> <p style="text-align: center;">Page 93</p>	<p>1 MR JUSTICE HILDYARD: Cassels J.</p> <p>2 MR GOY: Yes. On page 299 you will see he refers in the</p> <p>3 paragraph, the second full paragraph:</p> <p>4 "Mr Beney refers to re Cooper and Gateshead."</p> <p>5 He says he doesn't think neither of these cases are</p> <p>6 very helpful. Sadly, he doesn't say why.</p> <p>7 But I say that the clue to why he thought they are</p> <p>8 unhelpful does lie in the last paragraph of his</p> <p>9 judgment, the point being that in the case that he was</p> <p>10 looking at, when the right, as he saw it, arose, it</p> <p>11 arose only, if you like, at the end of the day, when the</p> <p>12 House of Lords made its decision. But the interest was</p> <p>13 then payable in respect of a prior period.</p> <p>14 In Gateshead, on the other hand, when the right</p> <p>15 arose, it was simply in respect of a debt repayable on</p> <p>16 demand.</p> <p>17 MR JUSTICE HILDYARD: But would you accept, at least in the</p> <p>18 contractual cases, that how long it takes you to get</p> <p>19 your money, absent agreement as to term, is irrelevant?</p> <p>20 MR GOY: Yes.</p> <p>21 MR JUSTICE HILDYARD: You accept that?</p> <p>22 MR GOY: Yes. The relevant question is: what is the term or</p> <p>23 intended term of the indebtedness, in the ordinary</p> <p>24 contractual --</p> <p>25 MR JUSTICE HILDYARD: In the contractual cases, if there's</p> <p style="text-align: center;">Page 95</p>
<p>1 right was in respect of a debt that would have</p> <p>2 an existence of more than a year. There is no link to</p> <p>3 a year at all, when the right arose. If that was the</p> <p>4 character of the interest at that point in time, it</p> <p>5 couldn't change its character over the period of time</p> <p>6 the indebtedness existed, merely because the parties</p> <p>7 didn't choose to enforce it.</p> <p>8 MR JUSTICE HILDYARD: Well, the problem with this sort of</p> <p>9 quasi-contractual or contractual cases is that once you</p> <p>10 get into that argument, I should have thought, Mr Goy,</p> <p>11 it is awfully difficult because there is not a suspicion</p> <p>12 that any of these creditors were content that they</p> <p>13 should not be paid for a year. If the surplus had been</p> <p>14 identified within three months, they wouldn't have said</p> <p>15 "Well, don't worry for another nine months".</p> <p>16 MR GOY: I will come on to that later but I say that's</p> <p>17 neither here nor there. The question is, when the right</p> <p>18 arises, to what period does it relate? Here it relates</p> <p>19 to a period in excess of a year.</p> <p>20 In Gateshead, when the right arose, to what did the</p> <p>21 interest relate? It related to a debt repayable on</p> <p>22 demand.</p> <p>23 I am effectively trying to reinforce that point. In</p> <p>24 the case of Regal (Hastings) -- Regal (Hastings) is</p> <p>25 after divider 41.</p> <p style="text-align: center;">Page 94</p>	<p>1 no expression of term and therefore it is repayable on</p> <p>2 demand, if you like, the fact that it takes you years</p> <p>3 and years to get your money is irrelevant.</p> <p>4 MR GOY: Yes.</p> <p>5 MR JUSTICE HILDYARD: It is not yearly interest?</p> <p>6 MR GOY: Yes. In other words, it is not a question of the</p> <p>7 time of payment.</p> <p>8 MR JUSTICE HILDYARD: No.</p> <p>9 MR GOY: That's not the time you look at it. So the mere</p> <p>10 fact that interest isn't paid for four years --</p> <p>11 MR JUSTICE HILDYARD: Yes.</p> <p>12 MR GOY: -- does not automatically mean it is yearly</p> <p>13 interest.</p> <p>14 MR JUSTICE HILDYARD: It's not the length of time</p> <p>15 outstanding which is relevant?</p> <p>16 MR GOY: One determines the character as at the time, in the</p> <p>17 contractual case, the loan is made.</p> <p>18 MR JUSTICE HILDYARD: So it's the nature of the right which</p> <p>19 you have to focus on?</p> <p>20 MR GOY: Yes. And also the nature of the indebtedness to</p> <p>21 which it relates and the nature of indebtedness to which</p> <p>22 it relates, typically will tell you the period -- the</p> <p>23 relevance is to look at the period of the indebtedness.</p> <p>24 So looking in the contractual case, you look at the</p> <p>25 right to interest, you look at the anticipated period of</p> <p style="text-align: center;">Page 96</p>

<p>1 the indebtedness. That tells you whether it is yearly 2 interest or not. But you characterise the right to 3 interest at the time the right first arises, at the time 4 of the making of the loan.</p> <p>5 I say one adopts a similar position in a case such 6 as this and in the three cases I've referred to. When 7 the right arises, you see to what extent that right can 8 be attributed to a period of more than a year or a year 9 or more. We say, looking at it at that time, in our 10 case and in the three cases that I've referred to, it is 11 yearly interest because it is attributable to a period 12 of a year or more.</p> <p>13 So we don't quarrel with Gateshead in saying: well, 14 you just look at the time of payment. We don't say 15 that. We say you look at the position at the time the 16 right to interest arises. In our case it is only when 17 all debts have been repaid and a surplus has been 18 identified. In the three cases I've referred to, in two 19 of them it was the court order and in the other case, 20 the deed. That's when you look at the question and you 21 say: well can that interest be related to a period of 22 more than a year?</p> <p>23 In other words, what I am broadly saying is that in 24 the common case, one simply -- i.e. the common 25 contractual case of a loan -- looks at the position, if</p> <p style="text-align: center;">Page 97</p>	<p>1 distinguishable in Regal (Hastings).</p> <p>2 What I now propose to do is look a little bit more 3 particularly at some of the applicants' submissions.</p> <p>4 At the forefront of their case, they say that in 5 order for interest to be yearly interest, it must be 6 interest that accrues over a period.</p> <p>7 They say that interest does not accrue for a period 8 when there is no obligation to pay, even though you 9 might ultimately get interest at the end of the day.</p> <p>10 But we say that accrual, in the sense put forward, 11 is simply not a requirement that has to be satisfied, 12 before interest can be classed as yearly interest.</p> <p>13 Now, we say on this, first of all, that the 14 authorities do not support my learned friend's 15 proposition. Quickly running through these authorities, 16 but if we start with Bebb v Bunney, at divider 30. This 17 is looking at page 437. He says the reference is there 18 to:</p> <p>19 "... interest which may become payable de anno in 20 annum, though accruing de die in diem, is within the 21 40th section."</p> <p>22 He takes from this that somehow what is said here 23 effectively defines what is required before interest can 24 be yearly interest.</p> <p>25 But if we look more particularly at this paragraph,</p> <p style="text-align: center;">Page 99</p>
<p>1 I can put it this way, prospectively. But where the 2 interest, when it arises, is not payable, if you like, 3 in respect of the future, it's not paid in respect of 4 being kept out of one's money as to the future, but is 5 payable as to the past, as to being kept out of one's 6 money as to the past, one simply looks at the period.</p> <p>7 So it is not time of payment. We don't put our case 8 like that. And if we put our case like that, certainly 9 Gateshead would be entirely inconsistent with our 10 submission. But we say it isn't because you have to 11 look at the time the right to interest arises and that's 12 the distinction between our case and Gateshead. We 13 believe, and we can only believe, that that was the 14 distinction that Cassels J thought of, when he found 15 Gateshead unhelpful.</p> <p>16 I make the same point regarding re Cooper. That was 17 interest under the Judgments Act but the interest 18 payable there, was interest payable as to the future. 19 In other words, it was payable in respect of a sum 20 payable immediately. It wasn't looking to the past. It 21 had no relationship with a year or more.</p> <p>22 So, just stopping there, we say that our position is 23 supported by the three cases that I've referred to, and 24 we say that the Mayor of Gateshead case is 25 distinguishable, as it was clearly thought</p> <p style="text-align: center;">Page 98</p>	<p>1 the judge says that:</p> <p>2 "I must hold that any interest which may be or 3 become payable ..."</p> <p>4 This was in the 40th section "may be". He then says 5 towards the end:</p> <p>6 "... I am clearly of opinion that it means at 7 least ..."</p> <p>8 Right at the end of the page:</p> <p>9 "... I am clearly of opinion that it means at least 10 all interest at a yearly rate, and which may have to be 11 paid de anno in annum; such as interest on purchase 12 money, as well as mortgage interest ..."</p> <p>13 "At least all". The judge is simply saying that the 14 interest to which he is referring will be yearly 15 interest. He was say "at least all of that is yearly 16 interest". He wasn't saying that that somehow was 17 a definition of yearly interest and nothing else could 18 be yearly interest, save that which did accrue in the 19 way that he refers. Quite simply, this passage does not 20 provide a definition. All he is saying is that 21 interest paid in these circumstances is; he doesn't say 22 that everything else isn't.</p> <p>23 So we say that this case is not authority that in 24 order for something to be yearly interest, there must be 25 accrual, in the sense to which Mr Gardiner refers, in</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 all cases. (Pause)</p> <p>2 I make the obvious point that the judge was not</p> <p>3 considering the sort of circumstances we have in this</p> <p>4 case.</p> <p>5 That is seemingly the principal case on which my</p> <p>6 learned friend relies. Quite frankly, there is not much</p> <p>7 other authority on this point on which he could rely.</p> <p>8 He does refer to Goslings and Sharpe, which is after</p> <p>9 divider 32A. All I say is that one cannot take out of</p> <p>10 that that there is any requirement for accrual.</p> <p>11 Lord Esher, on page 328, refers, towards the top of</p> <p>12 the page, referring to the interest in this case:</p> <p>13 "It is nothing do with a year. It is calculated</p> <p>14 upon and fixed by the fact that money is to be lent for</p> <p>15 three months, and not with reference to anything with</p> <p>16 regard to the year."</p> <p>17 So the entire emphasis there is whether the interest</p> <p>18 is payable in respect of a year or more. That's the</p> <p>19 emphasis, not on accrual.</p> <p>20 Bowen LJ, on page 331, says:</p> <p>21 "It seems to me that this is not yearly interest at</p> <p>22 all. It is not calculated with reference to a year in</p> <p>23 any sense."</p> <p>24 So, with respect, I say there is nothing in that</p> <p>25 case that supports the proposition that Mr Gardiner has</p> <p style="text-align: center;">Page 101</p>	<p>1 over a period is a common feature of that arrangement.</p> <p>2 We don't deny that; we simply say that one can't elevate</p> <p>3 a normal future into a requirement. You might do if</p> <p>4 there was authority supporting that, but we say there is</p> <p>5 no authority supporting that.</p> <p>6 The contractual cases we've looked at emphasise more</p> <p>7 than simply the period to which the interest relates,</p> <p>8 and one looks at that in the context of a loan by</p> <p>9 reference to its term or, if different, possibly by</p> <p>10 reference to the intention of the parties. But that is</p> <p>11 the crucial feature: is the interest payable in respect</p> <p>12 of a period of more than a year? That is typically</p> <p>13 looked at by looking at the term of the loan. Accrual</p> <p>14 is not a requirement that emerges from any of these</p> <p>15 cases.</p> <p>16 My Lord, is that a convenient place to stop?</p> <p>17 MR JUSTICE HILDYARD: Yes, certainly. Thank you, yes.</p> <p>18 MR GOY: I am going to say just a few more things on this</p> <p>19 argument, and then a few other arguments, but I don't</p> <p>20 think there will be a problem with timing.</p> <p>21 MR JUSTICE HILDYARD: Are we broadly up to time?</p> <p>22 MR GOY: Yes.</p> <p>23 MR JUSTICE HILDYARD: 2 o'clock, then.</p> <p>24 (1.00 pm)</p> <p>25 (The short adjournment)</p> <p style="text-align: center;">Page 103</p>
<p>1 put forward.</p> <p>2 There is more recent authority, Cairns v MacDiarmid.</p> <p>3 The passage to which you've been referred is at</p> <p>4 page 181.</p> <p>5 MR JUSTICE HILDYARD: This is tab 46, is it?</p> <p>6 MR GOY: Sorry, yes, tab 46.</p> <p>7 MR JUSTICE HILDYARD: 181?</p> <p>8 MR GOY: Yes. Just below letter H -- you have been referred</p> <p>9 to this paragraph before -- there is a reference to Bebb</p> <p>10 v Bunny. He says that he personally wished to avoid the</p> <p>11 use of the term "investment". Then he says:</p> <p>12 "On the facts found by the Commissioners, the loan</p> <p>13 to Mr Cairns was never intended to last for a more than</p> <p>14 a few days, albeit he was entitled to postpone the</p> <p>15 payment for two years. In fact, as it was always</p> <p>16 intended, his liability was discharged within the week</p> <p>17 not by repayment but by novation. The payment is not</p> <p>18 therefore annual interest."</p> <p>19 So there one can't take any point about the</p> <p>20 requirement for accrual, one is just looking to see</p> <p>21 whether something is yearly interest by reference to the</p> <p>22 intended period of the loan. That's all. No reference</p> <p>23 to accrual in the slightest.</p> <p>24 So we don't deny that, looking at the ordinary</p> <p>25 contractual arrangement, a simple loan, that accrual</p> <p style="text-align: center;">Page 102</p>	<p>1 (2.00 pm)</p> <p>2 MR GOY: My Lord, I ended up by saying that in our</p> <p>3 submission, the authorities do not support the</p> <p>4 proposition that in order for interest to be yearly</p> <p>5 interest, such interest has to accrue in the senses to</p> <p>6 which Mr Gardiner has referred.</p> <p>7 The only other specific point I would make in</p> <p>8 relation to this is just to refer to the statutory</p> <p>9 provision referred to in paragraph 26 of my learned</p> <p>10 friend's skeleton and to the statutory provision</p> <p>11 referred to in paragraph 10 of the annex. If you</p> <p>12 recollect, the reference there to "the tax rate</p> <p>13 determined by that applying during the period through</p> <p>14 which the same was accruing due."</p> <p>15 It was suggested that somehow that means that there</p> <p>16 is a requirement of the sort that I deny. I simply say</p> <p>17 whatever assumption is made in that section, that</p> <p>18 assumption does not create a requirement. Quite</p> <p>19 frankly, I doubt if the draftsman was doing any more</p> <p>20 than envisaging what is the common case with</p> <p>21 a contractual loan and he wasn't envisaging the sort of</p> <p>22 case we have here.</p> <p>23 My Lord, we accept that accrual over a period is</p> <p>24 an ordinary feature, both of interest and yearly</p> <p>25 interest, but we say that in neither case is accrual, in</p> <p style="text-align: center;">Page 104</p>

<p>1 the sense to which Mr Gardiner refers, a requirement 2 before there can be yearly interest. 3 I hope this isn't too much of a diversion, but the 4 argument put in this case is similar to that put in 5 <i>Riches v Westminster Bank</i>. It is divider 42, my Lord. 6 (Pause) 7 The three passages of Viscount Simon at page 398, 8 the paragraph starting "Mr Grant": 9 "Mr Grant advanced a further argument that the added 10 sum was not in the nature of 'interest' in the sense of 11 that expression in the Income Tax Acts because the added 12 sum only came into existence when the judgment was given 13 and from that moment had no accretions under the order 14 awarding it. (Interest on a judgment debt is of course 15 a separate matter and Mr Grant did not challenge the 16 view that this latter interest was subject to tax.) But 17 I see no reason why, when the judge orders payment of 18 interest from a past date on the amount of the main sum 19 awarded (or on a part of it) this supplemental payment, 20 the size of which grows from day to day by taking 21 a fraction of so much per cent per annum of the amount 22 on which interest is ordered, and by the payment of 23 which further growth is stopped, should not be treated 24 as interest attracting income tax." 25 Then on page 403, Lord Wright, the paragraph</p> <p style="text-align: center;">Page 105</p>	<p>1 the footing that it accrues to de die in diem has not 2 the essential quality of recurrence in sufficient 3 measure to bring it within the scope of income tax. 4 It's surely irrelevant that the calculation begins on 5 one day and ends on another and it is more important to 6 bear in mind that it is income." 7 I take and I submit that looking at those 8 paragraphs, it is not a requirement for a payment to 9 rank as interest, that there must be an accrual over 10 a period of time, of a right to receive interest. 11 I say that those passages indicate quite the 12 contrary. They are cases where the right is said to 13 arise only on the later date, not in a period prior to 14 that time. 15 All I say, if the applicants are right in this case, 16 it would mean that the feature, the lack of accrual on 17 which they rely, while not good enough to preclude the 18 interest being interest for tax purposes, is somehow 19 good enough to prevent it being yearly interest. 20 All I say about this is that this would be odd, 21 because the added requirement of yearly interest over 22 interest is simply the word "yearly", which relates on 23 its face, to a period of time and that alone. Accrual 24 on its face, does not relate to a period of time. 25 So I say it would be odd if the feature in this case</p> <p style="text-align: center;">Page 107</p>
<p>1 beginning: 2 "Of some minor contentions which have been raised, 3 I shall briefly advert to one. It was said that the sum 4 in question could not be interest at all because 5 interest implies a recurrence of periodical accretions." 6 Essentially the same argument as put here: 7 "Whereas this sum came into existence uno flatu by 8 the judgment of the court and was fixed once and for 9 all. But in truth ...(Reading to the words)... the 10 objection fails." 11 And to like effect on page 410, Lord Simons: 12 "It was further urged on behalf of the appellate the 13 interest ordered to be paid to him was not interest of 14 money for the purpose of tax because it had no existence 15 until it was awarded and did not have the quality of 16 being recurrent or being capable of recurrence." 17 What is said here is relevant to a submission I make 18 in a moment, that there is a sufficient element of 19 recurrence for this interest to be both interest and 20 yearly interest: 21 "This argument was founded on certain observations 22 in <i>Moss' Empires</i> in regard to the meaning of the word 23 'annual'. It will be sufficient to say ...(Reading to 24 the words)... either annual or yearly but in any case, 25 I do not understand why a sum which is calculated upon</p> <p style="text-align: center;">Page 106</p>	<p>1 on which the applicants rely, is somehow good enough to 2 prevent something being yearly interest but not 3 interest. 4 If I can just take this example, my Lord, which is 5 in our skeleton. Let us suppose that money is lent to 6 a company for three years, with the payment of interest 7 being contingent on the company making profits. Now, in 8 the sense in which the cases or in the way in which 9 Mr Gardiner has put the case, there will be no accrual 10 of interest during that period because you could not say 11 at any particular point in time that there is a right to 12 interest. We know that as a matter of tax law, such 13 interest would, in fact, be interest. That, I say, is 14 supported by the decision in <i>Riches</i>. 15 Can I say that the only reason I ultimately decided 16 I would refer to <i>Chevron</i> is for one paragraph, which is 17 on page 696. 18 Just above letter F. Do you see: 19 "Counsel for the <i>Chevron</i> group contended that since 20 it could not be foretold which of the operating parties 21 would become debtors and payers and which would become 22 creditors and receivers ...(Reading to the words)... not 23 vested and so there is no debt or other sum in which 24 there could be interest in the true sense of the word. 25 I do not think this follows ...(Reading to the words)...</p> <p style="text-align: center;">Page 108</p>

<p>1 why should a provision for repayment in these 2 circumstances, prevent the interest from being true 3 interest, if in the event, it becomes payable?" 4 So I say that there is no doubt in this sort of 5 case, where there is a contingency, that the interest 6 wouldn't be interest for tax purposes. Taking, perhaps, 7 the simplest example of a loan made to a company for 8 three years, with interest being payable only 9 contingently, I would submit that it would be odd in the 10 extreme, if the added word "yearly" somehow could be 11 interpreted in a way that would prevent that interest 12 being yearly. It may not accrue, but accrue really has 13 nothing to do with this. 14 So in essence what we say as to the applicants' 15 principal submission is that they are trying to elevate 16 what we say is a common feature of interest, and 17 necessarily yearly interest, into a requirement that has 18 to be satisfied before interest can be yearly interest. 19 We say there simply is no support for that argument, 20 most particularly no support in the case law, and there 21 are cases, in particular the three that I have referred 22 to, that are directly contrary to such a submission. 23 That was all I was proposing to say on the argument 24 there must be accrual. 25 The next point I would make is that the applicants</p> <p style="text-align: center;">Page 109</p>	<p>1 "Once their proved debts have been paid in full and 2 there's a surplus available, they will receive interest 3 on those proved debts for the periods commencing with 4 the start of the administration, while they are 5 outstanding." 6 That reference and what is said there is very 7 similar to what was said by Lord Wright in Riches. 8 So we say that the quality of the interest awarded 9 in this case would be such as to satisfy the requirement 10 that interest has a quality of recurrence, in the same 11 way as it was in Riches. 12 We say, secondly, that it certainly is the case that 13 in order to be yearly interest, there is no need for the 14 interest to be payable periodically. It doesn't make 15 any difference whether you make a single payment after 16 three years or three payments on an annual basis. And 17 authority for that is a case called Craven's Mortgage, 18 which is after divider 33. 19 I think I will be wasting time if I took you to this 20 case in detail but the reference is on page 457, where, 21 halfway down, with reference to Bebb v Bunney, I think it 22 is, he says: 23 "It has been argued that when the Vice-Chancellor 24 says 'payable to anno in annum' he means to confine 25 ...(Reading to the words)... at the end of yearly</p> <p style="text-align: center;">Page 111</p>
<p>1 say that before interest can be yearly interest, it must 2 have the quality of recurrence. As to this, I make 3 three points. 4 We say that the requirement for recurrence goes to 5 the quality of the payment, not whether it is made on 6 more than one occasion. 7 This is really the point I have already made. In 8 order for interest to be interest, it must have the 9 quality of recurrence and that quality was identified 10 in, for example, Riches and the passages which 11 I referred to, most particularly Lord Wright at 12 page 403. 13 It was said that: 14 "The sum in question could not be interest at all 15 because interest implies a recurrence of periodical 16 accretions, whereas this sum came into existence 17 uno flatu by the judgment of the court. But in 18 truth ..." 19 He goes on. 20 In other words, he was prepared to accept that the 21 required recurrent quality existed in that case and we 22 say it would exist equally in the present case. 23 In the Lehman's decision that has been referred to, 24 David Richards J says, I think it is paragraph 152, and 25 that paragraph ends by saying:</p> <p style="text-align: center;">Page 110</p>	<p>1 periods but he plainly cannot mean that for interest on 2 purchase monies not payable from year to year but when 3 the purchase money is paid on actual completion." 4 I simply make the point it would be odd in the 5 extreme if the obligations of a taxpayer under 6 section 874 could be altered by interest being payable 7 on a single occasion, rather than frequently during the 8 currency of the loan. 9 So as regards the requirement for recurrence, we say 10 those requirements are satisfied in the case. 11 Mr Gardiner also says, I think most particularly in 12 his skeleton, that the reason in contractual cases for 13 considering the intention of the parties, is to discern 14 the quality and characteristics of the right to 15 interest. 16 I think the relevant decision on this is Cairns, 17 after divider 46, to which you've been referred. 18 MR JUSTICE HILDYARD: Which tab? 19 MR GOY: 46. 20 MR JUSTICE HILDYARD: Thank you. 21 MR GOY: And page 181 and the paragraph that we looked at 22 just a short while ago. 23 We put our position on this slightly differently. 24 We say that the intention of the parties is considered 25 in order to determine the probable length of the</p> <p style="text-align: center;">Page 112</p>

<p>1 indebtedness by reference to which the interest is 2 payable. That's why you look at the intention. The 3 stress is ultimately on identifying the period in 4 respect of which the interest is or may be payable. 5 We say here, simply, there is no need to refer to 6 the intention of the parties because when the right to 7 interest first arises, the period in respect of which 8 the interest is payable is known. In other words, from 9 the date of the commencement of administration to, at 10 the very earliest, the date of first repayment of any 11 debts. 12 My next point is Mr Gardiner refers to cases 13 indicating that yearly interest must be payable in 14 respect of an obligation, having a tract of future time, 15 if you recollect the reference to the case of Hay. 16 That case was at divider 38. All I would say is 17 that what is said in that case is said in the context 18 of, effectively, contractual loans and provides no help 19 in the very different context of this case. 20 Likewise, I make the same point about it being said 21 that loans must have the character of an investment. 22 All of this is said in the different context of, 23 effectively, loans payable and interest payable on loans 24 as to the future. 25 The three cases I refer to and rely on, support</p> <p style="text-align: center;">Page 113</p>	<p>1 in that paragraph in putting forward our basic 2 submission because we're prepared to say and accept that 3 the right to interest accrued only as and when the 4 surplus gets repaid and a surplus arose. But we then 5 say that's the time you have to look at the character of 6 the interest and you determine the character of the 7 interest by looking back to the period to which that 8 interest relates. In this case, we say it relates to 9 a period in excess of a year in all cases. 10 So whatever thoughts we have, and I am going to come 11 on to them in a moment, about what's said in 12 paragraph 154, for the purpose of our principal 13 argument, we simply accept anything one likes to say 14 about that but, in particular, we accept that the right 15 accrues only at the end of the day. 16 So our principal argument does not proceed on any 17 disagreement with anything that's said in this 18 paragraph. 19 (Pause) 20 My Lord, as I've said, the approach of the courts -- 21 and I broadly finish what I say about our principal 22 argument now, but as I've said, the approach of the 23 courts in the context of contractual arrangements, is to 24 look at the position prospectively, from the time the 25 right to interest first arises. This was the position</p> <p style="text-align: center;">Page 115</p>
<p>1 a rather different view. 2 In Cairns, Lord Donaldson didn't and wasn't keen to 3 support the proposition and we say that that sort of 4 approach is appropriate in the context of loans but not 5 appropriate in the context of the sort of case we are 6 looking at. This is different. (Pause) 7 Perhaps lastly, Mr Gardiner says that their view of 8 the position has particular attractions because it gives 9 certainty to the administrators in paying interest. 10 We simply say that the position of the 11 administrators is no different from other taxpayers who 12 sometimes have to deduct and sometimes don't. 13 The test, we say, that should be applied, is 14 entirely straightforward. There is no difficulty 15 determining when deduction has to be made. 16 Or if there are difficulties, they are the sort of 17 difficulties that will arise generally, when yearly 18 interest is paid, in some ways considering whether 19 there's an obligation to deduct. 20 That is all I wanted to say on what Mr Gardiner has 21 said about the position. 22 If, on this argument, I sum up and simply say that 23 our argument proceeds, effectively, on the basis that 24 what David Richards J said in paragraph 154 is correct. 25 We don't have to disagree with that or anything he said</p> <p style="text-align: center;">Page 114</p>	<p>1 in Cairns and I haven't understood Mr Gardiner to say 2 anything suggesting he would disagree with that 3 proposition. 4 The question in those cases is whether the 5 indebtedness in respect of which interest is payable 6 will or may exist for a year or more. That's the 7 question. 8 Certainly in borderline cases, the intentions of the 9 parties is looked at to determine this. 10 As I've just said, we say in the present case that 11 reference to the intention of the parties is unnecessary 12 because in the present case, when the right to interest 13 first arises, the period by reference to which the 14 interest is payable is known. It's a period as to the 15 past, but it is known. 16 In particular, there is no reason or need to look at 17 the position prospectively because the period in respect 18 of which the interest is payable relates to the past and 19 is known. It doesn't relate to the future. 20 Now, fairly briefly, I would like to put 21 an alternative argument. If, contrary to our principal 22 submission, your Lordship takes the view that some sort 23 of prospective test is required, we say that such a test 24 can be applied in the present case by looking at the 25 position as at the time of the commencement of the</p> <p style="text-align: center;">Page 116</p>

<p>1 administration.</p> <p>2 We say one can look at the position at that time</p> <p>3 because that is the time that a right to interest arose,</p> <p>4 albeit contingently.</p> <p>5 Now, as to that point, I would ask your Lordship to</p> <p>6 refer back to the Riches case, divider 42. (Pause)</p> <p>7 And really to the passages that I've already shown</p> <p>8 your Lordship, at page 398 and 403, and 410.</p> <p>9 Now, if it is said that somehow there is no accrual</p> <p>10 in this case, and I am going to take you to</p> <p>11 David Richards J in a moment, I would submit that the</p> <p>12 only possible reason for saying that is because of there</p> <p>13 being a contingency. If there was no contingency, there</p> <p>14 clearly would be accrual.</p> <p>15 My submission is that that can be the only reason</p> <p>16 why there is no accrual.</p> <p>17 In Riches, in the cases that I've just referred you</p> <p>18 to, a form of accrual in a broad sense, was accepted.</p> <p>19 So when we go to the Lehman's decision, at paragraph 154,</p> <p>20 and I want to make two points about this. This is right</p> <p>21 at the bottom of the page. Mr Dicker says:</p> <p>22 "The statutory right to interest arising under rule</p> <p>23 288 can be regarded in hindsight as having accrued on</p> <p>24 a day-to-day basis since the commencement of the</p> <p>25 insolvency process, albeit contingently on there being</p> <p style="text-align: center;">Page 117</p>	<p>1 David Richards J to determine whether there was</p> <p>2 an accrual on a day-to-day basis, based on a right which</p> <p>3 existed ab initio because if it did, Bower v Marris</p> <p>4 applied and if it didn't, it didn't.</p> <p>5 MR GOY: Yes, I am getting into realms I am hesitant to get</p> <p>6 into, but the question as I understood it was, with</p> <p>7 respect to a particular payment one could, or</p> <p>8 a particular recipient could attribute some part of it</p> <p>9 to interest or capital.</p> <p>10 As I understand it, what the judge was saying was:</p> <p>11 well, how could you possibly attribute it to interest,</p> <p>12 when at the particular time, you had no right to the</p> <p>13 interest?</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 MR GOY: Because the right to the interest was contingent.</p> <p>16 So how could you attribute a receipt to something you</p> <p>17 may never get? That is how I see the context in which</p> <p>18 this argument is put.</p> <p>19 The mere fact, if you like, of the contingent nature</p> <p>20 of the right, would make any attribution of the payment</p> <p>21 to interest as very odd indeed. (Pause)</p> <p>22 MR JUSTICE HILDYARD: I am just trying to puzzle out 149.</p> <p>23 That's the crucial one, isn't it?</p> <p>24 MR GOY: Yes, what he is saying, as I understand it, is that</p> <p>25 there was no accrual in the strict sense because you had</p> <p style="text-align: center;">Page 119</p>
<p>1 ultimately a surplus."</p> <p>2 Well, stopping there, I would suggest it is very</p> <p>3 difficult to see what fault lies in that statement. If</p> <p>4 in fact there was no contingency, there would be</p> <p>5 accrual, on any view.</p> <p>6 MR JUSTICE HILDYARD: Which statement, Mr Dicker's?</p> <p>7 MR GOY: Sorry, the sentence that:</p> <p>8 "... the statutory right to interest."</p> <p>9 He says that and I am going to say something about</p> <p>10 whether the judge disagreed with that. But just looking</p> <p>11 at that, it is very difficult to see why there is no</p> <p>12 accrual, except if one says there is no accrual because</p> <p>13 it is contingent.</p> <p>14 Assume there was no contingency, there would be</p> <p>15 accrual on any view. So what makes this different? It</p> <p>16 can only be the contingencies.</p> <p>17 The only reason I make this point is because it is</p> <p>18 difficult to see what is wrong with that sentence. So</p> <p>19 when one reads the entirety of the paragraph, I would</p> <p>20 simply suggest it's not entirely clear whether the judge</p> <p>21 is refusing to accept everything that Mr Dicker has</p> <p>22 said, including the sentence I've referred to, or is</p> <p>23 just disagreeing with his essential argument referred to</p> <p>24 at the beginning of the paragraph.</p> <p>25 MR JUSTICE HILDYARD: It was crucial, wasn't it, for</p> <p style="text-align: center;">Page 118</p>	<p>1 no necessary right. You couldn't say you would be</p> <p>2 entitled to interest at that point in time and,</p> <p>3 therefore, how could you possibly attribute any part of</p> <p>4 your receipt to something you might not get?</p> <p>5 But coming to that conclusion doesn't negate the</p> <p>6 argument that: well, yes, we can't apply Bower v Marris</p> <p>7 but, nevertheless, it's wholly wrong to say that there</p> <p>8 is some form of contingent entitlement. A contingent</p> <p>9 entitlement certainly wouldn't allow and he decided, the</p> <p>10 judge decided, wouldn't allow you to attribute any part</p> <p>11 of the payment to interest.</p> <p>12 But that there was some form of contingent</p> <p>13 entitlement, I would suggest is, quite frankly, obvious</p> <p>14 and inevitable.</p> <p>15 I put that point on the basis that we say it is</p> <p>16 a respectable alternative approach in this case, to say</p> <p>17 that, looking at the time of the commencement of</p> <p>18 administration when a right to interest, albeit</p> <p>19 contingent, first arose, the question that can then be</p> <p>20 asked is whether any interest ultimately payable, albeit</p> <p>21 only payable contingently, would be payable in respect</p> <p>22 of a period of a year or more?</p> <p>23 We essentially say that the position would be no</p> <p>24 different from the case where, taking the example I gave</p> <p>25 earlier, there is a three-year loan, with interest</p> <p style="text-align: center;">Page 120</p>

<p>1 payable at 5 per cent per annum, contingent upon profits 2 being made over the three-year period. In looking at 3 the character of the interest, one would start with the 4 position at day one, when the loan was made. 5 So we say that it is, as an alternative approach, 6 appropriate to ask, whether looking at the position at 7 the commencement of administration, were the debts in 8 respect of which interest might ultimately be paid, 9 likely to be repaid within a year or not? 10 In other words, we equate the approach or we equate 11 that approach to the approach in Cairns. 12 We say if the debts looked at as at the time of 13 commencement of the administration were unlikely to be 14 repaid within the year, then the interest would be 15 yearly interest on that basis also. 16 Could I briefly make one or two legal and factual 17 points but not tax points, about the administration. 18 MR JUSTICE HILDYARD: Can I just ask you -- I'm so sorry, 19 Mr Goy. 154, in the last sentence on page 51: 20 "The statutory right to interest ...(Reading to the 21 words)... as having accrued on a day-to-day basis." 22 It says: 23 "The commencement of the insolvency process would 24 ...(Reading to the words)... on there being, ultimately, 25 a surplus."</p> <p style="text-align: center;">Page 121</p>	<p>1 obvious and "yes". It may mean that you cannot say that 2 at any particular point in time, prior to payment, that 3 you have a right to interest, I accept that. In other 4 words, an unconditional right to interest. But during 5 that period of time you can say "Well, yes, I will get 6 interest if I have an entitlement, contingent upon". 7 So I don't overdo this, but perhaps all I am saying 8 is that I find it very difficult to see what is wrong 9 and what this decision indicates is wrong with the 10 simple proposition that there is a right to interest, 11 albeit contingent. You may say that "Ah, but that means 12 there is no accrual of interest", as Mr Gardiner has 13 said. And I say "Well, it doesn't much matter because 14 that is not a requirement". But if one simply is saying 15 "Well, is there any form of right to interest?" I say 16 "Of course there is. It is contingent but it is there." 17 I don't want to repeat myself but going back to the 18 example of a loan at interest, with interest being 19 contingent upon profits, a loan for three years. Now in 20 those circumstances, I would suggest it would be very 21 odd, in looking at the nature of the interest, if one 22 didn't simply look at -- effectively apply what is said 23 in Cairns v MacDiarmid. Look at the position at the 24 commencement of the loan and see whether the interest 25 will be payable over a period of more than a year. One</p> <p style="text-align: center;">Page 123</p>
<p>1 What you are doing there, is you are looking back. 2 You know the contingency has, in the event, been 3 satisfied and there is a surplus. And he's asked -- 4 Mr Dicker is saying: 5 "In those circumstances, a contingency having been 6 satisfied, can you treat this as interest accruing over 7 the period?" 8 And Mr Dicker says "I think you can", and 9 David Richards J says "No, you can't". 10 MR GOY: All I am saying is that that makes perfect sense in 11 looking at the decision that the judge had to come to. 12 What was being said was that of a particular payment, 13 one could attribute something to interest and something 14 to capital, and what -- 15 MR JUSTICE HILDYARD: Sorry, all he was doing is -- the only 16 question relates to the appropriation issue, in 17 David Richards J's case. 18 MR GOY: Yes, so could anything be attributed to interest, 19 at a time when there was no certainty that any interest 20 would be payable? That was what he was concerned with. 21 So his decision appears to me to be entirely 22 understandable and correct. 23 But if you ask the question: well, looked at at the 24 time of the administration, is there a contingent right 25 to interest? I would say the answer to that is equally</p> <p style="text-align: center;">Page 122</p>	<p>1 would approach it that way, even though the right to 2 interest may be contingent and you may never get it. 3 So all I am trying to say, at too great length, is 4 that it is reasonable to take the view that there was 5 a right to interest, albeit contingent, and therefore 6 that it is appropriate to look at the position as 7 an alternative analysis, as at the time of commencement 8 of administration. 9 MR JUSTICE HILDYARD: In all the cases we've looked at, 10 except this, the thing which is going to give you the 11 contingent right, as you would describe it, is the 12 establishing of your debt. Whereas here -- 13 MR GOY: Well, with respect, it's not so much the 14 establishment of the debt, it's the establishment that 15 the company has assets to pay your debts. Assuming 16 these are proved debts, the debts exist. What is 17 unclear is whether there will be sufficient assets so as 18 to provide a surplus after repayment of all debts, to 19 give a right to interest. That is the uncertainty. 20 That is the contingency that has to be satisfied. 21 MR JUSTICE HILDYARD: I haven't thought this through 22 properly but what I was groping towards is that in both 23 the loan and the compensation cases, the right to 24 interest is referable and arises out of the debt. 25 Whereas in this case, it is referable and arises out of</p> <p style="text-align: center;">Page 124</p>

<p>1 and only if, there is declared to be a surplus.</p> <p>2 MR GOY: Yes. I think if one looks at the relevant rule, it</p> <p>3 is the case that the interest is payable still, on the</p> <p>4 debt. It is still interest paid on the debt but the</p> <p>5 right is very much a statutory right.</p> <p>6 MR JUSTICE HILDYARD: Yes.</p> <p>7 MR GOY: In other words, it's not a right to interest that</p> <p>8 derives from the terms of the debt.</p> <p>9 MR JUSTICE HILDYARD: Exactly. It's not appendant to the</p> <p>10 debt or the claim at all.</p> <p>11 MR GOY: Precisely. It may be that -- the debts could be</p> <p>12 all sorts, obviously, but it may be they are debts that</p> <p>13 carry interest at 1 per cent or 0 per cent and that</p> <p>14 a right to interest would arise under these provisions.</p> <p>15 So, yes, the right to interest is something rather</p> <p>16 different than has been looked at in any of the cases</p> <p>17 that you've been shown. It is a right to statutory</p> <p>18 interest --</p> <p>19 MR JUSTICE HILDYARD: Because the scheme of the</p> <p>20 Insolvency Act is to cut off all contractual rights and</p> <p>21 other rights.</p> <p>22 MR GOY: Yes.</p> <p>23 MR JUSTICE HILDYARD: And that's it and you can't say at</p> <p>24 a given moment, you have any right in -- that you have</p> <p>25 any rights and interest in right of your claim or your</p> <p style="text-align: center;">Page 125</p>	<p>1 is the source of your right? You know it's the</p> <p>2 contract. If you ask of the damages claim, what is the</p> <p>3 source of your right? You know it is the claim. When</p> <p>4 you ask here "What is the source of your right?" It is</p> <p>5 not the debt, it is only in the statute.</p> <p>6 MR GOY: Agreed, my Lord. Agreed. But nevertheless, the</p> <p>7 interest is payable in respect of and on the debt, as</p> <p>8 a result of the provisions, not of the contract, but of</p> <p>9 the statute.</p> <p>10 MR JUSTICE HILDYARD: Right.</p> <p>11 MR GOY: It remains interest on the debt or on the debts.</p> <p>12 So all I am trying to put forward is that the</p> <p>13 approach in, if you like, the contractual cases, Cairns,</p> <p>14 can be applied in this case, looking at the position as</p> <p>15 at the commencement of administration.</p> <p>16 It can be applied, I say, notwithstanding the fact</p> <p>17 that the right to the interest is contingent,</p> <p>18 notwithstanding that the right to interest actually</p> <p>19 derives from statute, rather than contract. Because</p> <p>20 while it derives from statute, the interest is still</p> <p>21 payable on those debts and must be in respect of those</p> <p>22 debts.</p> <p>23 So I say that it is an entirely reasonable</p> <p>24 proposition to say that the position is really no</p> <p>25 different from the normal contractual case. If the</p> <p style="text-align: center;">Page 127</p>
<p>1 indebtedness. You don't have any.</p> <p>2 MR GOY: Yes, I agree.</p> <p>3 MR JUSTICE HILDYARD: That's the whole point, it just says</p> <p>4 you don't.</p> <p>5 MR GOY: Yes.</p> <p>6 MR JUSTICE HILDYARD: And then it re-confers, if you like,</p> <p>7 but not in its pre-existing form or in anything to do</p> <p>8 with it, just a statutory interest.</p> <p>9 MR GOY: Yes, the interest ... (Pause)</p> <p>10 MR JUSTICE HILDYARD: There is no remission to contractual</p> <p>11 or other rights.</p> <p>12 MR GOY: Yes, I am looking at Rule 288(vii) which says:</p> <p>13 "Any surplus remaining after payment of the debts</p> <p>14 proved, shall, before being applied for any purpose, be</p> <p>15 applied in paying interest on those debts."</p> <p>16 MR JUSTICE HILDYARD: Yes, that's a measurement. You have</p> <p>17 to have something to measure.</p> <p>18 MR GOY: But, with respect, it must be in respect of those</p> <p>19 debts. The right to interest is a separate right,</p> <p>20 that's clear. It is, if you like, in substitution of</p> <p>21 all else but, nevertheless, it is interest payable in</p> <p>22 respect of the debts, on the debts as the provision</p> <p>23 refers, and it is payable because the creditors have</p> <p>24 been kept out of their money.</p> <p>25 MR JUSTICE HILDYARD: But if you ask of the contract, what</p> <p style="text-align: center;">Page 126</p>	<p>1 interest payable under statute might be paid in respect</p> <p>2 of debts that are outstanding for more than a year, it</p> <p>3 can be yearly and will be yearly interest.</p> <p>4 So I say the real question is whether, on the facts</p> <p>5 of this case, it's reasonable to say that the debts in</p> <p>6 question, looked at from the time of the commencement of</p> <p>7 the administration, were likely or unlikely to be repaid</p> <p>8 within a year.</p> <p>9 That is essentially the approach in Cairns.</p> <p>10 As to that point, relevant considerations are the</p> <p>11 length of the administration. I am quite sure</p> <p>12 your Lordship knows more about the law in this area than</p> <p>13 I do. That, if I may say, wouldn't be difficult. But</p> <p>14 the rules about the length of the administration are</p> <p>15 contained in Schedule B1 to the Insolvency Act and it is</p> <p>16 actually just divider 5. I am sure your Lordship is</p> <p>17 familiar with this, but it is after divider 5 and it is</p> <p>18 paragraph 76.</p> <p>19 MR JUSTICE HILDYARD: Yes.</p> <p>20 MR GOY: The basic rule is that the appointment has effect</p> <p>21 only for a year, but it may be extended in certain</p> <p>22 circumstances, in particular, by order of the court on</p> <p>23 the application of the administrator.</p> <p>24 We simply say that it is reason to believe that</p> <p>25 anyone with knowledge of the business of Lehman's at the</p> <p style="text-align: center;">Page 128</p>

<p>1 time, would have been anticipated that the</p> <p>2 administration would have taken considerably more than</p> <p>3 a year to complete.</p> <p>4 As to that, we rely on statements made in the</p> <p>5 witness statement of Nicola Rass, which is in volume 1,</p> <p>6 after divider 4, where she makes statements to that</p> <p>7 effect and refers to a variety of documents supporting</p> <p>8 that proposition, that this, broadly, was a hugely</p> <p>9 complex administration and would take a number of years</p> <p>10 to be completed. We know, of course, that the</p> <p>11 administration has been extended until now and is still</p> <p>12 ongoing.</p> <p>13 On this point I would simply ask you to refer to</p> <p>14 what she says and to the documents to which she refers.</p> <p>15 MR JUSTICE HILDYARD: What do you say about the -- maybe</p> <p>16 I have got it wrong, as to what Mr Gardiner was urging</p> <p>17 on me, but what do you say as to the question of interim</p> <p>18 payments? Supposing it emerges during the course of</p> <p>19 an administration that the recoveries are such that</p> <p>20 a really quite substantial proportion of the proofs can</p> <p>21 be met within the year, well within the year, and they</p> <p>22 are met. Presumably, you accept that as to that</p> <p>23 portion, any interest which might be payable, would not</p> <p>24 be --</p> <p>25 MR GOY: Yes, taking our principal argument, if I can go one</p> <p style="text-align: center;">Page 129</p>	<p>1 where the interest payable, payable under, if you like,</p> <p>2 statute, might or might not be yearly interest,</p> <p>3 depending upon the circumstances.</p> <p>4 I say the position is no different here.</p> <p>5 I have answered that by reference to our principal</p> <p>6 argument in this case, but I do say that there is no</p> <p>7 particular difficulty for the administrator in this</p> <p>8 because --</p> <p>9 MR JUSTICE HILDYARD: It depends whether he's got a whole</p> <p>10 load of foreign debt holders. If he has, they will be</p> <p>11 screaming blue murder, if it emerges that there is</p> <p>12 enough to pay out an interim distribution. They will go</p> <p>13 absolutely bananas if they can't get quickly, the</p> <p>14 payment because they know if they do get it, then the</p> <p>15 Revenue's position is that no tax will be recoverable</p> <p>16 and if they don't get it, they are going to have to</p> <p>17 account for the given percentage.</p> <p>18 So I don't think you can say there won't be</p> <p>19 difficulties for the administrators. I should have</p> <p>20 thought there will be -- and it may not matter because</p> <p>21 the statute is the statute it is, but I think it is</p> <p>22 possibly a little bit over-calm --</p> <p>23 MR GOY: Well I'll put --</p> <p>24 MR JUSTICE HILDYARD: -- to think that there won't be</p> <p>25 difficulties for the administrators.</p> <p style="text-align: center;">Page 131</p>
<p>1 step back --</p> <p>2 MR JUSTICE HILDYARD: Yes.</p> <p>3 MR GOY: -- I simply say that you look at the position when</p> <p>4 the right to interest arises and is then paid. You look</p> <p>5 to see to what period the interest relates.</p> <p>6 So to the extent to which interest is paid on</p> <p>7 certain debts to be paid within 11 months, it is not</p> <p>8 annual interest.</p> <p>9 If in respect of debts that are paid within</p> <p>10 13 months, it is.</p> <p>11 So I do say, and I am going back, if I may, to my</p> <p>12 principal argument now --</p> <p>13 MR JUSTICE HILDYARD: Yes.</p> <p>14 MR GOY: I do say that interest, this statutory interest,</p> <p>15 does not have the automatic character of either yearly</p> <p>16 interest or not yearly interest. It depends upon the</p> <p>17 particular circumstances. I would, if I may, just pray</p> <p>18 in aid, Jefford v Gee. If you remember the passage of</p> <p>19 Lord Denning, who very specifically says "Well you've</p> <p>20 got interest paid in respect of two, three or four</p> <p>21 years", that would be yearly interest. He doesn't refer</p> <p>22 to the possibility of the interest being paid within one</p> <p>23 year of the accident.</p> <p>24 I would say in those circumstances, it very clearly</p> <p>25 wouldn't be yearly interest. I say that that was a case</p> <p style="text-align: center;">Page 130</p>	<p>1 MR GOY: I will put it in this way. The application of the</p> <p>2 law, I say, is straightforward in these cases.</p> <p>3 MR JUSTICE HILDYARD: Right.</p> <p>4 MR GOY: Now, whether that gives rise to complaints by the</p> <p>5 creditors, that's another matter.</p> <p>6 MR JUSTICE HILDYARD: Just sometimes when you can see these</p> <p>7 effects rolling in, you wonder whether that was what was</p> <p>8 meant.</p> <p>9 MR GOY: Well, all I would say with regard to Parliamentary</p> <p>10 intent, I simply say, one simply cannot take</p> <p>11 Parliamentary intent for anything that is said in the</p> <p>12 legislation. It is difficult to say and assert that --</p> <p>13 well, Parliament, of course, never actually thought</p> <p>14 about this. We know that. It is difficult to refer to</p> <p>15 anything in the legislation that supports the argument</p> <p>16 that all interest must be treated as non-yearly. Where</p> <p>17 does one get it? There is nothing.</p> <p>18 So one is left, perhaps, to assert that somehow</p> <p>19 Parliament cannot have contemplated that there could be</p> <p>20 any practical difficulties arising to administrators</p> <p>21 and, therefore, to avoid any such difficulties, one must</p> <p>22 assume that this interest was intended to be non-yearly</p> <p>23 interest. There are big jumps and none of that, none of</p> <p>24 those practical difficulties, I say, is sufficient to</p> <p>25 outweigh what I submit is the law.</p> <p style="text-align: center;">Page 132</p>

<p>1 MR JUSTICE HILDYARD: That I accept. It was just rising to 2 the suggestion that it wouldn't cause difficulties for 3 administrators. 4 MR GOY: Perhaps what I meant -- I meant more specifically 5 that looking at our principal argument, the application 6 of what I say is the correct approach, is 7 straightforward. 8 MR JUSTICE HILDYARD: As razor blades are, as it were. 9 MR GOY: I say it is straightforward, it may be that this 10 gives rise to problems with creditors, who say "Well, 11 you should have distributed earlier". That may be. 12 Obviously, one thing the administrators will have to 13 be concerned with is whether they could have distributed 14 earlier. I suspect the truth is that, as often as not, 15 bearing in mind that in the normal case, administrations 16 come to an end within a year, this problem wouldn't 17 arise. Because accepting my analysis, if, in the 18 unlikely event interest would be paid and there is 19 a solvent administration, which perhaps isn't very 20 common, then in those short-term cases, it wouldn't 21 arise. 22 The situation is where, effectively, one may have 23 repayments of debts in whole or in part, over the 24 year-end, I suppose. That is where there may be, not 25 difficulties in applying the law, but where the</p> <p>Page 133</p>	<p>1 MR JUSTICE HILDYARD: So that's another rather awkward 2 moment for the administrators. 3 MR GOY: It is. It is. 4 MR JUSTICE HILDYARD: It is particularly awkward then, isn't 5 it, because there will be an entirely subjective 6 judgment to make and there will be a great many 7 interests affected? 8 MR GOY: Yes, I accept that. I accept that. But I do say 9 that difficulties in those circumstances, are not wholly 10 different -- they may be different in scale but not 11 different in nature from those arising in other 12 borderline cases, where it may be unclear as to whether 13 it is intended that a debt will continue for more than 14 a year. 15 MR JUSTICE HILDYARD: I mean, you get all sorts of arguments 16 about which part of it. 17 MR GOY: Exactly. How firm does their intention have to be? 18 All sorts of issues arise, if you like, from the basic 19 test in Cairns that are not explored there and one can 20 easily envisage do exist. 21 MR JUSTICE HILDYARD: That's why I am finding difficulty -- 22 I can't think of another context in which the same sort 23 of very, very awkward questions would arise, of foreign 24 creditors, let us say, saying "Look, it is absolutely 25 plain as day to me, we're going to get -- any right</p> <p>Page 135</p>
<p>1 administrator will have to be concerned as to his 2 position and he will have to make sure that he can 3 distribute as soon as he properly can. 4 MR JUSTICE HILDYARD: One's experience may be, I don't know 5 whether Mr Bayfield's will be the same, that the 6 administration is either over in five minutes because it 7 has all been prearranged or they take more than a year, 8 basically. But that may be too cynical. 9 MR GOY: I do make the point here that in this case, the 10 practical difficulties of this sort referred to, I just 11 say would not arise. This was so complicated, the 12 possibility of a distribution within 12 months, quite 13 frankly, I would say and submit, was remote. 14 So possibly difficulties, practical difficulties in 15 other cases, not here. 16 I simply say if there are practical difficulties -- 17 MR JUSTICE HILDYARD: That's the law. 18 MR GOY: -- that's the law. 19 I have gone back to my principal argument. The 20 secondary argument is looking at the position rather 21 differently, it is looking at the position as at the 22 time the administration is commenced, to see whether or 23 not it was likely that debts would be repaid within 24 a year, and then I say one applies a sort of Cairns v 25 MacDiarmid analysis.</p> <p>Page 134</p>	<p>1 thinking administrator is going to distribute at least 2 20 per cent." And the administrator says "No, no, it is 3 a very difficult economic climate, I don't think so." 4 MR GOY: That will require a judgment by the administrator 5 and he must act properly as administrator and that will 6 be his defensive criticism that's levied at him. 7 MR JUSTICE HILDYARD: Well, as you say, practical 8 difficulties can't drive the legal conclusion but they 9 do -- bearing in mind it is a fairly practical piece of 10 work, the Insolvency Act, largely dependent on the work 11 as from pretty practical folk. 12 MR GOY: The reason why I favour our principal argument is 13 that in terms of, if you like, there being a practical 14 piece of work -- 15 MR JUSTICE HILDYARD: Yes. 16 MR GOY: -- that can be applied without difficulty, I say 17 that our test can be applied without difficulty. 18 Yes, some might not like the consequences but as, if 19 you like, a legal test, a legal approach, it is 20 straightforward. Whereas with the alternative, I do 21 accept there are greater practical difficulties with 22 applying it because views have to be taken as to the 23 likelihood of repayments of debts within a year and that 24 may cause difficulty in different circumstances. 25 All I would say is that it is very difficult to</p> <p>Page 136</p>

<p>1 think in this case, that there is any practical</p> <p>2 possibility of debts being repaid within a year. As it</p> <p>3 happened, no debts were repaid, in fact, for three</p> <p>4 years. The first repayment to unsecured creditors was</p> <p>5 2012. It is very difficult to think, bearing in mind</p> <p>6 the complexity of Lehmans, the huge nature of its</p> <p>7 business, the functions that the administrator would</p> <p>8 have to perform, that there is no real likelihood -- of</p> <p>9 course, a possibility -- but no real likelihood of debts</p> <p>10 being repaid in any part, within the 12-month period.</p> <p>11 MR JUSTICE HILDYARD: I don't like to raise the question,</p> <p>12 really, but for how long was your publication INS 7433</p> <p>13 in issue publicly?</p> <p>14 MR GOY: I don't know the answer. (Pause)</p> <p>15 If we may assume it was -- I don't know when it was</p> <p>16 taken.</p> <p>17 MR JUSTICE HILDYARD: When was it first ...</p> <p>18 MR GARDINER: My Lord, we believe it is at least 2006</p> <p>19 onwards and it had some existence before.</p> <p>20 MR GOY: We're going to try and find the answer.</p> <p>21 But can we just assume that is so. I know it is not</p> <p>22 for me to ask you questions, but what follows from that?</p> <p>23 MR JUSTICE HILDYARD: Well, I am sure much of Lehman's debt</p> <p>24 is held by people who have traded in it.</p> <p>25 MR GOY: We believe so.</p> <p style="text-align: center;">Page 137</p>	<p>1 made by the Revenue to Lehmans, we accept that. But in</p> <p>2 terms of the published statement, it does make sense in</p> <p>3 terms of how the Revenue have explained it. It related</p> <p>4 to interest being paid to the Revenue.</p> <p>5 MR JUSTICE HILDYARD: I don't doubt that for a minute, I am</p> <p>6 just wondering what other people may think. But anyway,</p> <p>7 there we are, it is an example of the sort of</p> <p>8 difficulties which arise.</p> <p>9 MR GOY: Just a few more points, if I may?</p> <p>10 MR JUSTICE HILDYARD: Yes.</p> <p>11 MR GOY: The authorities indicate that in general terms,</p> <p>12 interest will be yearly interest, even though there's no</p> <p>13 certainty the indebtedness will continue beyond a year.</p> <p>14 Very briefly, if I can just give you some</p> <p>15 references. They are in my skeleton, but <i>Bebb v Bunny</i>,</p> <p>16 divider 30, page 437, the paragraph that you've been</p> <p>17 referred to:</p> <p>18 "I must hold that any interest which may be ..."</p> <p>19 MR JUSTICE HILDYARD: Should I go through these with you</p> <p>20 now? Is that what are you wanting?</p> <p>21 MR GOY: It is just -- little snippets, really.</p> <p>22 MR JUSTICE HILDYARD: Thank you.</p> <p>23 MR GOY: Page 437 of <i>Bebb v Bunny</i>, divider 30:</p> <p>24 "I must hold that ..."</p> <p>25 The paragraph towards the end of the page:</p> <p style="text-align: center;">Page 139</p>
<p>1 MR JUSTICE HILDYARD: And I do not know and I do not wish to</p> <p>2 successfully pursue the point, the basis on which they</p> <p>3 were trading.</p> <p>4 MR GOY: Well, I don't know either.</p> <p>5 MR JUSTICE HILDYARD: No.</p> <p>6 MR GOY: They were almost certainly trading because the</p> <p>7 right to interest was a minimum 8 per cent.</p> <p>8 MR JUSTICE HILDYARD: It is a brilliant deal.</p> <p>9 MR GOY: It is a brilliant deal.</p> <p>10 MR JUSTICE HILDYARD: Yes. The question is whether they</p> <p>11 thought they would have to pay tax on it.</p> <p>12 MR GOY: Well, that's for them to analyse.</p> <p>13 MR JUSTICE HILDYARD: Well, anyway -- the potential for</p> <p>14 difficulty is obvious, isn't it?</p> <p>15 MR GOY: But, with respect, that position is no different</p> <p>16 from anybody else who purchases a debt with a right to</p> <p>17 interest. That person will have -- assuming he is</p> <p>18 non-resident that is, where the position is particularly</p> <p>19 crucial, he will have to work out whether it is yearly</p> <p>20 interest or not. That will be up to him to work out.</p> <p>21 MR JUSTICE HILDYARD: Yes. Often one has to take a view on</p> <p>22 the law, but it may be said that the view of the law was</p> <p>23 as published.</p> <p>24 MR GOY: Well, but with respect, we say that someone -- I,</p> <p>25 of course, accept that there were misleading statements</p> <p style="text-align: center;">Page 138</p>	<p>1 "I must hold that interest which may be or</p> <p>2 become ..."</p> <p>3 MR JUSTICE HILDYARD: Yes.</p> <p>4 MR GOY: That was adopted -- well, perhaps I won't take you</p> <p>5 any further than <i>Cairns v MacDiarmid</i>. Divider 46,</p> <p>6 page 181, the passage you've been referred to already:</p> <p>7 "Interest payable on a mortgage provided for</p> <p>8 repayment of the money after six months or indeed</p> <p>9 a shorter period, would still be annual interest, if</p> <p>10 calculated yearly ...(Reading to the words)... and if</p> <p>11 the intention of the parties is that it may have to be</p> <p>12 paid from year to year ..."</p> <p>13 I should say that <i>Kerr LJ</i> says something slightly</p> <p>14 different but, nevertheless, I still put the proposition</p> <p>15 as I have done, on page 182 --</p> <p>16 MR JUSTICE HILDYARD: Yes.</p> <p>17 MR GOY: -- where he says:</p> <p>18 "On the other hand ..."</p> <p>19 Do you have that? Towards the end:</p> <p>20 "... a loan on a mortgage which is nominally</p> <p>21 repayable after six months and which ...(Reading to the</p> <p>22 words)... annual interest because the true intention of</p> <p>23 the parties is that it should be a long-term loan beyond</p> <p>24 a year, indeed, probably over many years."</p> <p>25 I don't want to overstate the position here but all</p> <p style="text-align: center;">Page 140</p>

<p>1 I say is that certainly Bebb v Bunny and Lord Donaldson 2 suggest that if it is likely that an indebtedness will 3 exceed a year, interest paid on it will be yearly 4 interest, even though there is no actual certainty that 5 that will be the case.</p> <p>6 I have referred you earlier to -- well, you have 7 been referred to earlier, to the decision in Mayor of 8 Gateshead, where I've said that in my submission, that 9 case is distinguishable from the present. But there is 10 just one further passage that I would refer you to on 11 page 889.</p> <p>12 MR JUSTICE HILDYARD: I've lost it. Sorry, Gateshead -- 13 I've got it, page -- 14 MR GOY: It's divider 36, page 889 -- 15 MR JUSTICE HILDYARD: I've got it. 36. 16 MR GOY: -- where halfway down the page he says: 17 "Whether or not the present case could have been 18 brought into line with the mortgage cases, if it had 19 been shown by the evidence that the Corporation followed 20 a regular practice of investing their funds, by allowing 21 time to ...(Reading to the words)... monies due from 22 them with interest, it is unnecessary for me to 23 consider." 24 So he is suggesting that the position might have 25 been different, had there been a regular practice of</p> <p style="text-align: center;">Page 141</p>	<p>1 administration is that there was and is an effective 2 moratorium on the ability of the company's creditors to 3 pursue payment of the company's debts.</p> <p>4 We've included in the statutory bundle, at 5 divider 4, provisions that effectively relate to the 6 terms of that moratorium.</p> <p>7 MR JUSTICE HILDYARD: Yes. 8 MR GOY: After divider 4, Schedule B1, and perhaps 9 paragraph 43. You will be far more familiar with this 10 than I am but effectively you will see in paragraph 43: 11 "No step may be taken to enforce security over the 12 company's property, except ..." 13 Blah, blah. Sorry, it is 6 at the bottom: 14 "No legal process may be instituted or continued 15 against the company or property of the company, except 16 with the consent of the administrator or with the 17 permission of the court." 18 So, in effect, the result of the company going into 19 administration is for a creditor to be precluded from 20 taking action for recovery of his debt, except in 21 specific circumstances referred to. 22 We say that the effect of this moratorium was that 23 it was unlikely that the creditors would be able to take 24 action to recover their debts within a year, nor would 25 they, in fact, as a matter of practice, be likely to</p> <p style="text-align: center;">Page 143</p>
<p>1 allowing time to pay.</p> <p>2 Rather more obvious is the case where the parties 3 agree that there should be time to pay.</p> <p>4 MR JUSTICE HILDYARD: We know that for a long time -- 5 I don't know what the position is, but mortgages were 6 repayable according to their terms within six months but 7 were very rarely enforced within that date. Obviously, 8 the mortgage terms were being ... Is that any different 9 from here? I.e, if it is plain that the practice has 10 replaced the words, if you like, and that is the 11 intention of the parties that it should, that may 12 qualify?</p> <p>13 MR GOY: Yes, that's what I say does qualify. 14 I would say, equally, the position would be 15 qualified if there were an agreement to that effect. 16 MR JUSTICE HILDYARD: Right. 17 MR GOY: And likewise, which is relevant to our case, we say 18 the position is different if, as a result of the 19 commencement of administration, there is an enforced 20 period of forbearance as regards the collection of 21 debts. 22 Effectively, what we're saying is that a statutory 23 period of forbearance is equivalent to an agreement 24 between parties, deferring time of collection. 25 As you well know, the effect of a company going into</p> <p style="text-align: center;">Page 142</p>	<p>1 recover their debts within a year in this particular 2 administration.</p> <p>3 So we say that the position is no different from 4 that which would have arisen, had the parties come to 5 an agreement in the terms of the moratorium.</p> <p>6 Interest payable in respect of the debts concerned 7 would be yearly interest, if the upshot of the 8 arrangements would make it unlikely that debts would be 9 repaid within a year.</p> <p>10 We say that is the position here. 11 Now, that is all I really wanted to say on that 12 alternative argument. That argument is criticised by my 13 learned friend and all I say about his criticisms are 14 that, well, he says that the argument is wrong because 15 interest doesn't accrue. Well, I've dealt with that 16 already. 17 Then, most likely, he refers to the practical 18 difficulties that would arise if this alternative 19 approach is correct. 20 We do accept that there may be some practical 21 difficulties but that, we say, is a result of the law. 22 It may be the case that it could be said that this is 23 a good case, where statute should provide specifically 24 for what should be the position, as it has in other 25 cases, I should say, but it hasn't in this case and we</p> <p style="text-align: center;">Page 144</p>

<p>1 say that the position has to be governed by the law, as</p> <p>2 we have it, not the law as we might wish it would be.</p> <p>3 (Pause)</p> <p>4 MR GOY: Yes, my Lord, that is all I wanted to address you</p> <p>5 on, subject to one small point I have here.</p> <p>6 MR JUSTICE HILDYARD: Yes.</p> <p>7 MR GOY: I am told that INS 7433 was withdrawn in early</p> <p>8 2012.</p> <p>9 The administrators' letter, this is the only thing</p> <p>10 I was going to say, asking HMRC to confirm the position,</p> <p>11 the first letter was, I am told here, I haven't checked</p> <p>12 this, 6 February 2013.</p> <p>13 But I do say that, really, nothing follows in these</p> <p>14 proceedings as regards any INS7433.</p> <p>15 We say that was not misleading. Any payments to the</p> <p>16 Revenue would be made gross under specific statutory</p> <p>17 provisions. What went wrong here was that certain</p> <p>18 officers of the Revenue misunderstood the effect of that</p> <p>19 guidance.</p> <p>20 MR JUSTICE HILDYARD: Well, the question before me is one of</p> <p>21 statutory construction --</p> <p>22 MR GOY: Yes.</p> <p>23 MR JUSTICE HILDYARD: -- and I accept that. But in working</p> <p>24 out in what may be a difficult context, I have to know</p> <p>25 as best I can, the difficulties in practice, because</p> <p style="text-align: center;">Page 145</p>	<p>1 sort of suggestion that Lord Denning was just going off</p> <p>2 on a frolic of his own, with little knowledge of the</p> <p>3 distinctions between interest and yearly interest, I say</p> <p>4 would be wrong.</p> <p>5 MR JUSTICE HILDYARD: Yes.</p> <p>6 MR GOY: That was the only point of my referring to that.</p> <p>7 MR JUSTICE HILDYARD: Yes. Well, that's very helpful. Is</p> <p>8 there anything more? (Pause)</p> <p>9 MR GOY: Ms Addy has just made one point to me.</p> <p>10 MR JUSTICE HILDYARD: Yes.</p> <p>11 MR GOY: If, in an administration, the administrators apply</p> <p>12 the law as I say it should be applied and along comes</p> <p>13 a creditor and says "Well, hang on, you've applied this</p> <p>14 law, but actually, you should have distributed 11 months</p> <p>15 after you went into administration", the administrator</p> <p>16 will simply say, "Well, he acted in good faith and took</p> <p>17 all reasonable steps." That will be his defence, as</p> <p>18 I understand it.</p> <p>19 So that an administrator acting properly is likely</p> <p>20 to be bothered by unjustified complaints, yes, but</p> <p>21 acting properly, he won't be bothered by justified</p> <p>22 complaints.</p> <p>23 So an administrator acting properly would ultimately</p> <p>24 have nothing more to fear than the hassle of dealing</p> <p>25 with people who make unjustified complaints. If he acts</p> <p style="text-align: center;">Page 147</p>
<p>1 I feel that in construing the content and the nature of</p> <p>2 this right to statutory interest, which I think you</p> <p>3 accept is the basic point, I think I have to bear</p> <p>4 practical difficulties in mind.</p> <p>5 MR GOY: Yes, my Lord. I can only repeat what I've said,</p> <p>6 that the practical difficulties can't dictate the law.</p> <p>7 MR JUSTICE HILDYARD: No.</p> <p>8 MR GOY: And, secondly, in our first and principal argument,</p> <p>9 we say there are no practical difficulties in applying</p> <p>10 the law as we say it is, apart from the inevitable</p> <p>11 complexity that an administration of this sort would</p> <p>12 carry in any event.</p> <p>13 MR JUSTICE HILDYARD: Yes.</p> <p>14 You at one moment referred me, but only in passing,</p> <p>15 to <i>Corinthian v Cato</i>. Is there anything you want to say</p> <p>16 about that?</p> <p>17 MR GOY: No. There, Lord Denning talks about something</p> <p>18 being an investment.</p> <p>19 MR JUSTICE HILDYARD: Yes.</p> <p>20 MR GOY: And I say well, yes, that's appropriate in the</p> <p>21 context of contractual indebtedness, not here. My real</p> <p>22 point about that case was to say nothing more than that</p> <p>23 case was heard -- I don't have the dates.</p> <p>24 MR JUSTICE HILDYARD: Yes, before <i>Jefford</i> --</p> <p>25 MR GOY: But not that long before <i>Jefford v Gee</i>. So some</p> <p style="text-align: center;">Page 146</p>	<p>1 improperly, that's another matter.</p> <p>2 MR JUSTICE HILDYARD: Of course, yes. They know they have</p> <p>3 to do what they think is right and they will be</p> <p>4 supported under the insolvency regime --</p> <p>5 MR GOY: And they will be supported by the courts.</p> <p>6 MR JUSTICE HILDYARD: -- and necessary applications to the</p> <p>7 court for protection, yes.</p> <p>8 But it is one of those aspects which they might have</p> <p>9 to consider more closely, if you were right.</p> <p>10 MR GOY: Yes. They might have to consider more closely,</p> <p>11 exactly when they could distribute. I do stress that we</p> <p>12 don't see that this gives rise to any problem in the</p> <p>13 present case at all.</p> <p>14 MR JUSTICE HILDYARD: Right. Okay. Thank you.</p> <p>15 MR GOY: My Lord, thank you.</p> <p>16 MR JUSTICE HILDYARD: Shall we break for a little bit and</p> <p>17 then how long will you be in reply?</p> <p>18 MR GARDINER: We will certainly finish by close of play, my</p> <p>19 Lord, I would have half an hour at most.</p> <p>20 MR JUSTICE HILDYARD: Half an hour at most. Okay.</p> <p>21 (3.23 pm)</p> <p>22 (A short break)</p> <p>23 (3.30 pm)</p> <p>24 MR JUSTICE HILDYARD: Mr Goy, I'm sorry, when you thought</p> <p>25 your labours were done. Can I just clarify one thing</p> <p style="text-align: center;">Page 148</p>

<p>1 with you. I understand it doesn't arise on the way you</p> <p>2 put the case or it may not in any event, but at one</p> <p>3 moment the question arose as to the difference in</p> <p>4 language and the abandonment of the notion of accruing</p> <p>5 and the use of the word "arising", and you said you</p> <p>6 might get back to me about that. Is there anything</p> <p>7 I should know about that?</p> <p>8 MR GOY: No. We would say that -- it is difficult to know</p> <p>9 the difference.</p> <p>10 Ordinarily, one might use them, if you like, almost</p> <p>11 as alternatives.</p> <p>12 MR JUSTICE HILDYARD: They don't slip off my tongue, not</p> <p>13 being a tax lawyer, but I understand if I were a tax</p> <p>14 lawyer, they might slip off my tongue quite easily.</p> <p>15 MR GOY: Well, they don't slip off this tax lawyer's tongue.</p> <p>16 MR JUSTICE HILDYARD: They don't?</p> <p>17 MR GOY: No.</p> <p>18 When one looks at a charge to tax arising in respect</p> <p>19 of something arising or accruing --</p> <p>20 MR JUSTICE HILDYARD: Yes.</p> <p>21 MR GOY: -- typically, the tax there is unlikely to rise</p> <p>22 until there's entitlement. It does depend very much on</p> <p>23 the context.</p> <p>24 MR JUSTICE HILDYARD: Yes.</p> <p>25 MR GOY: But typically, except in the computation of trading</p> <p style="text-align: center;">Page 149</p>	<p>1 may accrue, albeit it doesn't arise in respect of there</p> <p>2 being a right to payment. You can say that: well, over</p> <p>3 a period, interest is accruing, albeit you can only</p> <p>4 claim it in a year's time or so. You may say:</p> <p>5 nevertheless, interest is accruing over that period.</p> <p>6 You may say that interest would only arise when you have</p> <p>7 an entitlement to payment. So it can mean different</p> <p>8 things, I think, in different contexts --</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 MR GOY: -- but in the context of the receipt of interest,</p> <p>11 Mr Gardiner may correct me, it hasn't typically been</p> <p>12 an issue because arising or accrual doesn't create the</p> <p>13 tax point.</p> <p>14 MR JUSTICE HILDYARD: I suppose I put the question wrongly,</p> <p>15 perhaps. I suppose what I am getting at is do you</p> <p>16 accept that the introduction of what was considered to</p> <p>17 be more modern language, has not changed the substance</p> <p>18 of the provision?</p> <p>19 MR GOY: No, I don't think it has.</p> <p>20 MR JUSTICE HILDYARD: No.</p> <p>21 MR GOY: Again, if you don't receive interest, you're not</p> <p>22 going to be taxed on it.</p> <p>23 MR JUSTICE HILDYARD: Right. So I could, if I wanted, read</p> <p>24 it as "arising or accruing", wherever it appeared?</p> <p>25 MR GOY: Ms Addy has just said that it may be worth just</p> <p style="text-align: center;">Page 151</p>
<p>1 profits, one only pays tax when one receives sums of</p> <p>2 money, in the context of interest and income tax.</p> <p>3 That's a general proposition. So one isn't faced with</p> <p>4 issues, certainly in an income tax context, of whether</p> <p>5 something arises or accrues, because you're not taxed on</p> <p>6 accrual, you're not taxed on something that arises,</p> <p>7 you're taxed on receipt.</p> <p>8 MR JUSTICE HILDYARD: But in the context of interest,</p> <p>9 I rather got the impression, back to the days of Prime</p> <p>10 Minister Addington, that arising or accruing was</p> <p>11 a phrase which almost was a horse and carriage. But</p> <p>12 I may be wrong about that.</p> <p>13 MR GOY: Again, going back for longer than I could possibly</p> <p>14 say I was alive, the typical position is that</p> <p>15 receivability without receipt is nothing. So typically</p> <p>16 in a tax context, not in computing profits of a trade,</p> <p>17 I might say, nor on looking at the position of a company</p> <p>18 but in terms of income tax, these are issues that one</p> <p>19 isn't concerned with. In other words, you don't</p> <p>20 compute, in paying tax on interest, the amount of</p> <p>21 interest that has accrued over a year, for example.</p> <p>22 That's not the test.</p> <p>23 So it's not really a question that arises commonly</p> <p>24 in a tax context.</p> <p>25 One can certainly -- and one can argue that interest</p> <p style="text-align: center;">Page 150</p>	<p>1 bearing in mind that the words were "arising or</p> <p>2 accruing".</p> <p>3 MR JUSTICE HILDYARD: Yes.</p> <p>4 MR GOY: That does suggest there is a distinction between</p> <p>5 the two.</p> <p>6 MR JUSTICE HILDYARD: It does, yes.</p> <p>7 MR GOY: But the law was changed so as to get rid of the "or</p> <p>8 accruing", in the belief that made no difference.</p> <p>9 MR JUSTICE HILDYARD: I think you've hit the nail on the</p> <p>10 head. People keen on words might say, actually, they</p> <p>11 were rather different but it was intended to mean the</p> <p>12 same thing.</p> <p>13 MR GOY: Certainly that's the view that has been taken</p> <p>14 latterly, anyway.</p> <p>15 MR JUSTICE HILDYARD: Yes, thank you so much.</p> <p>16 Yes.</p> <p>17 Submissions in reply by MR GARDINER</p> <p>18 MR GARDINER: My Lord, yes. Just on that last point, and</p> <p>19 I think we agree there, that the tax law simplification</p> <p>20 project didn't make any difference from 2005 onwards.</p> <p>21 I have drawn attention from 1803 onwards, to those words</p> <p>22 throughout in the legislation, "arising or accruing".</p> <p>23 I can't remember how long ago your Lordship left the</p> <p>24 Bar, but if I just explain this. Traders have always</p> <p>25 been treated as taxable on an accruals basis, an</p> <p style="text-align: center;">Page 152</p>

<p>1 earnings basis. All other people under case 2 of</p> <p>2 Schedule D, other than authors and barristers, were all</p> <p>3 treated as being taxable on an earnings or accruals</p> <p>4 basis. The cash basis --</p> <p>5 MR JUSTICE HILDYARD: We would have it on a received basis</p> <p>6 and were rather shocked when it changed.</p> <p>7 MR GARDINER: Yes, which all disappeared -- I can't remember</p> <p>8 exactly, but about 12 years ago. If my learned friend</p> <p>9 doesn't know these tax law and accruals basis, he is in</p> <p>10 for a shock. But we are taxed nowadays on an accruals</p> <p>11 basis.</p> <p>12 MR GOY: (Inaudible). I was assuming I was a bit of</p> <p>13 a trader really, I suppose.</p> <p>14 MR GARDINER: Accruals are something, as I say, within the</p> <p>15 terms of the legislation, a concept that I think perhaps</p> <p>16 we understand. I always thought, despite what my</p> <p>17 learned friend said, that we and accountants understand</p> <p>18 perhaps par excellence but there we are.</p> <p>19 I accept entirely, this case is a question of law</p> <p>20 but your Lordship did ask about the published statement</p> <p>21 and could I just clarify what the position is there.</p> <p>22 Just as a matter of fact, I've already made the</p> <p>23 point that in its last known form, it was issued in</p> <p>24 2006. There was a relatively similar version of it from</p> <p>25 May 2002. Yes, my learned friend said it was withdrawn</p> <p style="text-align: center;">Page 153</p>	<p>1 That bundle and under the heading of "Statutory</p> <p>2 interest", yes, on pages 47 and 48, at the bottom</p> <p>3 right-hand corner, from the Revenue. It is an email</p> <p>4 from Mr Rush, following on from that letter to</p> <p>5 Mr Fieldon(?) and he said, under the heading "Statutory</p> <p>6 interest":</p> <p>7 "As you say, although withdrawn for redrafting, the</p> <p>8 guidance is to remain unchanged."</p> <p>9 So if I can get back to the various points that my</p> <p>10 learned friend made this morning, why is accruals and</p> <p>11 the period of accrual relevant and what's the authority</p> <p>12 for it, is where he starts.</p> <p>13 We say it is in <i>Bebb v Bunney</i>. It's that first</p> <p>14 passage in <i>Bebb v Bunney</i>, which we say is definitional.</p> <p>15 I've made that point and I am sure your Lordship has the</p> <p>16 passage I have in mind.</p> <p>17 MR JUSTICE HILDYARD: Yes.</p> <p>18 MR GARDINER: But it is not just <i>Bebb v Bunney</i>, it is the</p> <p>19 whole of our historical analysis in the appendix. It is</p> <p>20 starting with the terminology I've dealt with "income</p> <p>21 arising or accruing", and that is terminology that goes</p> <p>22 throughout, for over 200 years, right up until the tax</p> <p>23 law simplification project, changing that terminology in</p> <p>24 2005.</p> <p>25 So it starts in section 2008, at the inception of</p> <p style="text-align: center;">Page 155</p>
<p>1 in 2013 --</p> <p>2 MR GOY: 12, I said.</p> <p>3 MR GARDINER: Well, I think it is 2013. Let me put it this</p> <p>4 way. If your Lordship wants to know the circumstances</p> <p>5 in which was withdrawn, in volume 2 of the bundle, at</p> <p>6 pages 47 and 48, there is a letter from my learned</p> <p>7 friend's clients which said it was withdrawn for</p> <p>8 redrafting but no intention to change it.</p> <p>9 So that's the position. As I said, as far as my</p> <p>10 argument is concerned, it is a question of law, but</p> <p>11 your Lordship has asked about the position. That is the</p> <p>12 position in relation to ... (Pause)</p> <p>13 It is volume 2, pages 47 and 48.</p> <p>14 MR JUSTICE HILDYARD: Yes.</p> <p>15 MR GARDINER: You will see simply:</p> <p>16 "Furthermore, the guidance under any INS7433</p> <p>17 ...(Reading to the words)... is to remain unchanged."</p> <p>18 MR JUSTICE HILDYARD: Yes.</p> <p>19 MR GARDINER: There's a letter from Mr Rush(?), a longish</p> <p>20 letter, the beginning of it, dated 6 February 2013.</p> <p>21 That's why I referred to 2013.</p> <p>22 MR JUSTICE HILDYARD: I think they said early 2012</p> <p>23 withdrawn, and then they refer to the subsequent</p> <p>24 correspondence by the administrator in 2013.</p> <p>25 MR GARDINER: Yes. (Pause)</p> <p style="text-align: center;">Page 154</p>	<p>1 income taxes, as one can know it, in <i>Addington's Act</i> and</p> <p>2 going throughout. And we did draw particular attention</p> <p>3 to the 1864 Act provisions. I didn't quite follow what</p> <p>4 my learned friend's answer to that was. But, I mean, we</p> <p>5 say it is plain on the face of that, that provision,</p> <p>6 that lasted for all those years, that they were applying</p> <p>7 a rate because the draftsman of that provision knew that</p> <p>8 yearly interest had to accrue. I mean, he was applying</p> <p>9 a rate by reference to a condition, a constituent, of</p> <p>10 that species of thing called "yearly interest". He</p> <p>11 wasn't applying any other rate for any other species or</p> <p>12 anything else at all. He was presupposing that yearly</p> <p>13 interest accrues.</p> <p>14 One might ask oneself, if this particular case</p> <p>15 arose, where would be the period that one would actually</p> <p>16 take the rate for during those years, in relation to</p> <p>17 this particular interest?</p> <p>18 That is fairly fundamental, we say, but, as I say,</p> <p>19 it's the whole of that historic analysis.</p> <p>20 MR JUSTICE HILDYARD: As a matter of fact, I am not sure</p> <p>21 that does arise, does it, because I think it has been at</p> <p>22 8 per cent throughout.</p> <p>23 MR GARDINER: That's right.</p> <p>24 MR JUSTICE HILDYARD: But I can see the theoretical</p> <p>25 argument.</p> <p style="text-align: center;">Page 156</p>

<p>1 MR GARDINER: Yes. But it would be the tax rate. That's</p> <p>2 what we're concerned with. It would be the income tax</p> <p>3 rate.</p> <p>4 MR JUSTICE HILDYARD: Oh I see, yes.</p> <p>5 MR GARDINER: It is the tax rate. During that period of</p> <p>6 four years, I'm not very good I'm afraid, at rates.</p> <p>7 We're now on a basic rate of 20 per cent and I cannot</p> <p>8 recollect during that period, whether there was</p> <p>9 a change --</p> <p>10 MR JUSTICE HILDYARD: I see, you would have to know what the</p> <p>11 tax rate was, to see what --</p> <p>12 MR GARDINER: You would know what the tax rate is for the</p> <p>13 year, yes. And of course, we say there's no period of</p> <p>14 accrual here, so you would be left up in the air as to</p> <p>15 what rate do you actually take?</p> <p>16 But the point is that there is what we say is</p> <p>17 an exhaustive statement, a fundamental acceptance by the</p> <p>18 draftsman of the legislation. That provision lasted for</p> <p>19 whatever it was, 80-odd years. I'm sorry, it is less</p> <p>20 than that. It is 63 years, I'm sorry.</p> <p>21 MR JUSTICE HILDYARD: Until 1927.</p> <p>22 MR GARDINER: Yes, until 1927, yes. But all one is saying</p> <p>23 is that the draftsman of that legislation, one can see</p> <p>24 the build-up to it, was plainly proceeding on the basis</p> <p>25 that there had to be a period of accrual for the animal</p> <p style="text-align: center;">Page 157</p>	<p>1 somebody making an investment that is accruing over time</p> <p>2 with interest, and that is simply different threads of</p> <p>3 language, all aimed at the same point.</p> <p>4 So that's what I say in definitional terms, is the</p> <p>5 basis for what we say, concentrating on the accruals and</p> <p>6 it's not merely the accruals, it is getting there with</p> <p>7 the benefit of the other cases as well, a tract of</p> <p>8 future time and investments.</p> <p>9 Then shortly to deal with his three cases and what</p> <p>10 a ragbag of authorities they are. Barlow -- and I don't</p> <p>11 think I need take you to it. I've made my point on</p> <p>12 this. But if one looks at simply the recitals to the</p> <p>13 1930 deed, it recites the fact that -- Sir Thomas,</p> <p>14 I think it was -- Sir Thomas Barlow, the person who was</p> <p>15 the trustee who took him court, was indebted because of</p> <p>16 his actions. That's what it actually says.</p> <p>17 Perhaps we could perhaps look at that. It is in the</p> <p>18 authorities bundle --</p> <p>19 MR JUSTICE HILDYARD: 39.</p> <p>20 MR GARDINER: 39, yes, I am grateful. Thank you.</p> <p>21 It is on page 3, towards the top of the page. You</p> <p>22 can see at the end of the previous page he is setting</p> <p>23 out the recitals. It starts:</p> <p>24 "And whereas the said proceeds amounted in all, to</p> <p>25 the gross sum of £27,720 and the present market value of</p> <p style="text-align: center;">Page 159</p>
<p>1 that is the animal we're concerned with, yearly</p> <p>2 interest. That flows back to the words of the</p> <p>3 Vice-Chancellor in <i>Bebb v Bunney</i> and I do not accept for</p> <p>4 one moment that he was throwing out the words <i>de die in</i></p> <p>5 <i>diem</i>, just for the sake of throwing out some words that</p> <p>6 were casually around in common law spaces. And he's</p> <p>7 using definitional terms, definitional language, for</p> <p>8 saying "In effect, I am defining what yearly interest</p> <p>9 is."</p> <p>10 It is not just that. It is the approach in the</p> <p>11 other cases. They are all coming together to look at</p> <p>12 the same kind of thing. We have, with respect, and</p> <p>13 I still don't understand how my learned friend gets over</p> <p>14 it, we have the Scottish judges talking about a tract of</p> <p>15 future time. Well, you can't have a tract of future</p> <p>16 time in this particular case because as and when the</p> <p>17 interest arises, it is not applicable to the future,</p> <p>18 it's only applicable, on their analysis, to the past.</p> <p>19 The whole basis of his primary argument is you look</p> <p>20 at a past period and that clearly is not something,</p> <p>21 conceptually, that those judges in <i>Scottish North</i></p> <p>22 <i>American Trust</i> and <i>Hay</i>, had in mind.</p> <p>23 Again, we say there is no answer to the</p> <p>24 investment-type point, <i>Rowlatt J</i> in particular, in the</p> <p>25 other cases. All those approaches coalesce to look at</p> <p style="text-align: center;">Page 158</p>	<p>1 the investment ...(Reading to the words)... will be</p> <p>2 considered less than that ..."</p> <p>3 Then over the page:</p> <p>4 "... less than that sum and interest on that sum,</p> <p>5 calculated at the rate of 5 per cent per annum, less</p> <p>6 income tax at the rate of four shillings in the pound,</p> <p>7 from the 26th day of October 1923 ..."</p> <p>8 That's when he took the assets away, out of the</p> <p>9 names of the trustees, realised them and put them in his</p> <p>10 own name. So the date of said realisation:</p> <p>11 "... up to the first day of January 1930 [that was</p> <p>12 the date of the deed] and compounded at the same rate</p> <p>13 ...(Reading to the words)... £7,704 ..."</p> <p>14 And then goes on:</p> <p>15 "... whereas it is apprehended that the settlor is</p> <p>16 liable to pay to the trustees by way of replacement for</p> <p>17 the purposes of the settlement, a sum not greater than</p> <p>18 £35,424, being the aggregate of the said sums of</p> <p>19 27,000-odd and the 7,700-odd of interest."</p> <p>20 So the recitals recites that he is already -- he is</p> <p>21 liable to pay those amounts, and he is liable to pay</p> <p>22 those amounts, in accordance with the principle that</p> <p>23 I've referred to and which the judge there relies on,</p> <p>24 the principle that <i>James LJ</i> set out in <i>Vyse v Foster</i> and</p> <p>25 that is the passage that I read to your Lordship in</p> <p style="text-align: center;">Page 160</p>

<p>1 opening.</p> <p>2 So that's the first case that's relied on and the</p> <p>3 second case, Regal (Hastings), is exactly to the like</p> <p>4 effect, because again, it is a fiduciary obligation.</p> <p>5 They made the profit, each of the defendants, £1,400-odd</p> <p>6 and as we saw towards the end of Lord Russell of</p> <p>7 Killarney's speech, he has come to the conclusion they</p> <p>8 had that fiduciary obligation to make good the loss.</p> <p>9 And he then says:</p> <p>10 "They must make good the loss. They must account</p> <p>11 for the loss as with interest at 4 per cent."</p> <p>12 The only basis of that interest -- there is no</p> <p>13 mention of the 1934 Act because it wasn't relevant, it</p> <p>14 was an equitable remedy, and that is the interest in</p> <p>15 respect of it.</p> <p>16 The point, just stopping there, is really this, the</p> <p>17 point I think I made in opening. Judges don't create</p> <p>18 liabilities, they recognise them.</p> <p>19 One can test it simply enough in this way. You say</p> <p>20 "Ah, the liability is created on the judgment". Well,</p> <p>21 what happens when the defendant pays up without</p> <p>22 a judgment? In those circumstances, is it the defendant</p> <p>23 creating the liability at that particular moment in</p> <p>24 time? It's not the defendant creating the liability at</p> <p>25 that moment in time, he is recognising that he has</p> <p style="text-align: center;">Page 161</p>	<p>1 a discretion which is conferred on them and which may be</p> <p>2 invariable to exercise, but which is, nevertheless, not</p> <p>3 something revealed but something imposed?</p> <p>4 MR GARDINER: Yes. Firstly, I would say in answer to that,</p> <p>5 my Lord, (a) you don't have to decide that for the</p> <p>6 purposes of this case.</p> <p>7 MR JUSTICE HILDYARD: Right.</p> <p>8 MR GARDINER: That is the first point. That's not shirking</p> <p>9 the question. I will go on to deal with it.</p> <p>10 MR JUSTICE HILDYARD: Yes.</p> <p>11 MR GARDINER: In one sense you might say the giving of any</p> <p>12 judgment in any circumstance may be within the</p> <p>13 discretion of the court. It will have to consider the</p> <p>14 matters or whatever. But fundamentally you have to</p> <p>15 start by, what is the legal situation? And one can</p> <p>16 imagine a whole stack of different alternatives. Let's</p> <p>17 imagine there is a debt and the debt carries interest</p> <p>18 and the defendant says "I'm not going to pay it". And</p> <p>19 there is no doubt that there is a debt and it carries</p> <p>20 interest.</p> <p>21 MR JUSTICE HILDYARD: That's easy.</p> <p>22 MR GARDINER: That's easy, yes, that's why I start with it.</p> <p>23 Then one goes to the next stage. Let's take the stage</p> <p>24 where post-1969, a personal injury matter, where in</p> <p>25 effect, as Lord Denning says in Jefford v Gee, it's</p> <p style="text-align: center;">Page 163</p>
<p>1 existing liability. It is an existing liability that</p> <p>2 was there and present at a particular date and because</p> <p>3 it was there and present at a particular date, he has to</p> <p>4 pay interest on it. The court order, therefore, doesn't</p> <p>5 create a liability, it doesn't establish a liability, it</p> <p>6 recognises it. It confirms it.</p> <p>7 MR JUSTICE HILDYARD: But how does that work with interest</p> <p>8 awarded by the court on a compensatory basis or on</p> <p>9 a time basis?</p> <p>10 MR GARDINER: As a matter of equity, it is there. It's</p> <p>11 a fundamental principle. If you have a breach of trust,</p> <p>12 equity says that you must make good the breach of trust.</p> <p>13 That is an equitable principle. That is a matter of</p> <p>14 law. As at the moment of time you break your trust, you</p> <p>15 have a liability from that moment of time and in</p> <p>16 consequence of you having that liability, equity says</p> <p>17 you must pay interest on it.</p> <p>18 Equity has always been running on that particular</p> <p>19 basis and has never had this problem that the common law</p> <p>20 had in respect of damages and the like, created by some</p> <p>21 of the older cases at law. That is the equitable</p> <p>22 principle.</p> <p>23 MR JUSTICE HILDYARD: But in the case of a non-equitable</p> <p>24 jurisdiction, are judges, in awarding interest,</p> <p>25 revealing what was always there or are they exercising</p> <p style="text-align: center;">Page 162</p>	<p>1 compulsory. Yes?</p> <p>2 Let's take that. Now, if you get those</p> <p>3 circumstances, you will then get a situation where</p> <p>4 damage has been occurred at a point X. The case comes</p> <p>5 to court three years later. The court then says "Fine,</p> <p>6 damage has occurred at point X. We award £100,000 as at</p> <p>7 that date and the interest runs from that date".</p> <p>8 In those circumstances, it would be right to say, in</p> <p>9 my respectful submission, that that would be a situation</p> <p>10 where interest has accrued on a debt and therefore it</p> <p>11 was likely to be the result that that would be treated</p> <p>12 as yearly interest.</p> <p>13 If you take the other end of the spectrum, there was</p> <p>14 some real dispute and real, real, real prospect that</p> <p>15 there may well not be any award of interest at all and</p> <p>16 it was, in reality, very much within the absolute</p> <p>17 discretion of the court and nobody, really, could</p> <p>18 predict at the outset which way it might go, then the</p> <p>19 answer might well be that it wasn't yearly interest</p> <p>20 because it was wholly dependent upon that particular</p> <p>21 award.</p> <p>22 But as I say, that is my -- I would call it</p> <p>23 speculation but that is my submission as to what is the</p> <p>24 likely effect in those circumstances. But I do say and</p> <p>25 do emphasise that your Lordship doesn't have to decide</p> <p style="text-align: center;">Page 164</p>

<p>1 it for the purpose of deciding this case and you don't</p> <p>2 have before you, all the necessary material. Because</p> <p>3 you would obviously have to look at the statutory</p> <p>4 provisions, the actual facts and all the rest of it, to</p> <p>5 come to a particular conclusion on a particular case.</p> <p>6 With the greatest respect, I don't think in Jefford v</p> <p>7 Gee they ever came to any such a conclusion because</p> <p>8 Lord Denning says at the end of the day, "We'll make an</p> <p>9 award and everybody in these cases should make an award</p> <p>10 in the gross sum and we'll leave the taxpayer or the</p> <p>11 person making the payment, to work out whether he's got</p> <p>12 to deduct or not."</p> <p>13 I think that is all I want to say at that particular</p> <p>14 stage, in respect of that. I call them the ragbag of</p> <p>15 cases. Those three cases -- in my respectful</p> <p>16 submission, the first two are simple to deal with on the</p> <p>17 basis of the equitable remedy.</p> <p>18 The third, there is no real analysis, et cetera, and</p> <p>19 we are left up in the air to some extent, as to what the</p> <p>20 precise position is. But I've made my submissions as to</p> <p>21 what I believe would be the right answers.</p> <p>22 I think that what one's dealt with and I think</p> <p>23 your Lordship put this point to my learned friend, but</p> <p>24 perhaps if I just make it. At one stage in his primary</p> <p>25 argument, he said: you determine the matter at the time</p> <p style="text-align: center;">Page 165</p>	<p>1 that. They say "This is not the type of thing that is</p> <p>2 intended by yearly interest." That's what they say.</p> <p>3 MR JUSTICE HILDYARD: Because it was only forbearance and</p> <p>4 nothing like a loan.</p> <p>5 MR GARDINER: That's right. It is the final --</p> <p>6 MR JUSTICE HILDYARD: The final page.</p> <p>7 MR GARDINER: Yes, the final page. The last break in</p> <p>8 Lord Sumner's judgment:</p> <p>9 "But not in such a form as would apply to it the</p> <p>10 words 'any yearly interest of money', in section 40."</p> <p>11 So it is those words that I read to you and I think</p> <p>12 my learned friend read to you and I won't read that.</p> <p>13 But it is all that passage. It is the final page of his</p> <p>14 judgment.</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR GARDINER: As I said in opening, and I don't want to</p> <p>17 repeat myself, we say that that case has to be</p> <p>18 conclusive of this. The only means of trying to get out</p> <p>19 of it is something which, with respect, you can't find</p> <p>20 in any of the judgments whatsoever.</p> <p>21 Then my next point is this. My learned friend spent</p> <p>22 a lot of time saying "Well, there's a contingent right</p> <p>23 to the interest." Well, I mean, the facts of the matter</p> <p>24 are that there isn't, during the period when you would</p> <p>25 have to establish an accruer. No right to the interest.</p> <p style="text-align: center;">Page 167</p>
<p>1 when the right to the interest arises. That's on the</p> <p>2 identification of the surplus.</p> <p>3 It therefore seems to follow, and I think he</p> <p>4 accepted this and I think your Lordship, I think, put it</p> <p>5 to him, that if you have a situation where there's</p> <p>6 a payment in year 1, then in those circumstances, that</p> <p>7 would be non-yearly interest, and if there's a payment</p> <p>8 in year 2, then that would be yearly interest. I just</p> <p>9 wanted to clarify that.</p> <p>10 But the next point or perhaps more significantly, is</p> <p>11 this. He attempts to get out of the decision in</p> <p>12 Gateshead by suggesting that the question was looked at</p> <p>13 at the outset. Now, that's what he says, because what</p> <p>14 he doesn't do is actually identify anything whatsoever</p> <p>15 in the judgments in that case that actually says that.</p> <p>16 All we know from that case is that the payment situation</p> <p>17 went on for years and we know the exact terms of what</p> <p>18 Lord Sumner said in the case. And I am not going to</p> <p>19 take your Lordship to it, because I think you've been</p> <p>20 taken to it, probably, three times already anyway, and</p> <p>21 I am sure you will be conscious of the terms. But what</p> <p>22 I am saying is you can scour the judgments there. None</p> <p>23 of them say you've got to look at the position at the</p> <p>24 outset and nobody knew at the outset, whether this was</p> <p>25 going to go on for any time or not. None of them say</p> <p style="text-align: center;">Page 166</p>	<p>1 There simply isn't any right. It is no good calling it</p> <p>2 a contingent right. There is no right during that</p> <p>3 period. That's back to Waterfall IIA and what</p> <p>4 David Richards J said.</p> <p>5 You could say, in a sense, you could have</p> <p>6 a contingent right to interest, if Parliament in its</p> <p>7 wisdom, decided to change the law with retrospective</p> <p>8 effect and give one in future. You can say, you know,</p> <p>9 anything, if you like, in terminology like that. The</p> <p>10 simple fact is, there is no right to the interest. It</p> <p>11 is no good calling it a contingent right. We all know</p> <p>12 as a matter of trust law, one talks about rights of</p> <p>13 expectancy and contingent rights and all the rest of it.</p> <p>14 The whole basis, the whole rationale, of David</p> <p>15 Richards J's judgment, is it is not a contingency, it</p> <p>16 doesn't exist during that period. That's why none of</p> <p>17 those payments can actually be regarded as or</p> <p>18 appropriated to payments of interest.</p> <p>19 MR JUSTICE HILDYARD: It is an elusive distinction, isn't</p> <p>20 it, Mr Gardiner?</p> <p>21 MR GARDINER: Yes.</p> <p>22 MR JUSTICE HILDYARD: I would welcome your assistance on</p> <p>23 this because I may have got it completely wrong. I put</p> <p>24 it to Mr Goy that in the case of a debt or damages</p> <p>25 claim, the suitcase in which the debt or damage claim</p> <p style="text-align: center;">Page 168</p>

<p>1 includes a contingent right to the award or vesting of 2 interest. But my understanding of the insolvency regime 3 is that those are stripped out of the suitcase by force 4 of the section. 5 MR GARDINER: Yes. 6 MR JUSTICE HILDYARD: And nothing is left of the right 7 incidental to the claim or the debt? 8 MR GARDINER: Yes. 9 MR JUSTICE HILDYARD: All that happens is you get 10 a statutory right, which is measured over time, hence it 11 is interest -- 12 MR GARDINER: Yes. 13 MR JUSTICE HILDYARD: -- but does not arise out of the 14 original claim. It arises out of the fact that you are 15 a creditor in the insolvency, who has put in a proof of 16 debt which has been accepted, and there turns out to be 17 a surplus. 18 MR GARDINER: My Lord, I accept that entirely and I noticed 19 that exchange between your Lordship and my learned 20 friend and I made a particular note of it and I think, 21 but I don't know whether the transcript writers do this, 22 I don't think they do, but I think it was about 23 a quarter to 3, and the point that I think you made in 24 my note was "It's not dependent on the debt or claim at 25 all, it arises because there is something different,</p> <p style="text-align: center;">Page 169</p>	<p>1 cited about yearly interest in the case. The only case 2 of any bearing at all was Riches v Westminster and 3 Riches v Westminster Bank -- my learned friend has made 4 a great play of it and all the rest of it but at the end 5 of the day, rather like the oil companies case, it is 6 a case on interest simpliciter and we've always accepted 7 in this case, that this is interest. What we do say is 8 the discrimen between yearly interest and interest is 9 along the lines of the authorities that are dealing with 10 that distinction between yearly interest and interest, 11 and all of those authorities, they were all starting 12 from the premise that it was interest and the critical 13 question was, was it yearly? And the ratio of them is 14 to the effect that it was either yearly or wasn't, in 15 those circumstances. 16 The fact that some of the cases don't refer to 17 "accruer", doesn't, in our respectful submission, mean 18 anything at all, because if it is an obvious case where 19 there is an accruer, then that's not a point in issue 20 and they would only deal with the points in issue. But 21 the starting point, as I go back to, is Bebb v Bunny. 22 The decision, as I said, and the definitional decision 23 of the then Vice-Chancellor in the passages that I rely 24 on, but in particular, also as followed through in the 25 historical analysis.</p> <p style="text-align: center;">Page 171</p>
<p>1 something separate, the surplus." 2 And that is the fundamental distinction in that 3 case. That is right. That is why, as I said, you don't 4 have to decide the issue in damages cases and all the 5 rest of it, because they are different. I ventured my 6 views as to what their position is. But at the end of 7 the day, this case, in a sense, is as far as I'm aware, 8 unique. It is on that particular factor. We are not 9 looking at a debt which carries interest on accruals or 10 a prospective or a contingent basis, as you put it, in 11 the suitcase. It is in another suitcase coming in, some 12 other money coming in, and somebody comes along at 13 a particular point in time and he says "You can have it 14 out of this suitcase instead." 15 That is the fundamental distinction in this case. 16 I think, with respect, that gets rid of all this 17 terminology about the contingent right to the interest, 18 for reasons I've given. 19 Two other short points. I'm afraid these are 20 disparate but I am trying to pick up the only points 21 I thought I should respond to that my learned friend has 22 addressed. 23 As far as Jefford v Gee is concerned, and again, one 24 can simply make this point and I don't need to go and 25 look at the case, none of the relevant authorities were</p> <p style="text-align: center;">Page 170</p>	<p>1 I'm not sure there's a great deal more that I wish 2 to say. But if you would bear with me for a moment ... 3 (Pause). 4 Yes, I perhaps ought to say a little bit about the 5 alternative argument. I think I've made my main points 6 on the main argument. 7 If we are right that you need a period of accrual 8 and this period of calculation argument is wrong, then 9 their alternative argument is also wrong, for the same 10 reasons. Because if there is a fundamental requirement 11 that you have to have a period of accrual, then whatever 12 people's ideas were at the beginning of the period of 13 administration or not, if you're lacking a period of 14 accrual, you fail. That, with respect, is what we say 15 in paragraph 63 of our skeleton, which I didn't read out 16 but plainly your Lordship has read it all. But in 63 we 17 said, looking at the alternative argument: 18 "In any event, even leaving all its difficulties 19 aside ..." 20 And one has seen some of them in the oral 21 interchange today and some of the points that we've 22 summarised in these paragraphs: 23 "Even leaving all its difficulties aside, the 24 alternative argument is not right, since for the reasons 25 already given, statutory interest does not, as a matter</p> <p style="text-align: center;">Page 172</p>

<p>1 of law, have the basic prerequisites of yearly 2 interest."</p> <p>3 That's our primary submission in paragraphs 47 to 42 4 of our ...</p> <p>5 Again, perhaps I haven't made this point but I think 6 it flows on from what I've been saying in relation to 7 the contingency point, that David Richards J was saying 8 that by statute, the payments that were made on account 9 of principal, were exactly what they purported to be, 10 they were all principal and therefore interest could 11 only arise or accrue after those payments had been made.</p> <p>12 So there is no right to interest unless something 13 else happens, i.e. there is more money available, there 14 is a surplus and you recognise the fact that you have 15 that surplus. That is then a new factor, a new matter, 16 a new fact, that gives rise to it being applied as 17 interest, at the stage when it has been identified.</p> <p>18 I don't think that I really want to say anything 19 more about the alternative argument because, as I say, 20 if we're not right on our primary argument, we're not 21 right, we fail. If we are right on our primary 22 argument, that destroys both of the arguments put 23 forward on behalf of the Revenue.</p> <p>24 Of course, those two arguments are completely 25 inconsistent within themselves. The first argument says</p> <p style="text-align: center;">Page 173</p>	<p>1 expectations of the administrators at the commencement 2 of administration. They've just been appointed. They 3 probably don't have the faintest idea at that particular 4 stage, as to what the real position is. They might, 5 they might have been looking at it and have some kind of 6 view about it, or they might not at all. But apparently 7 that's the test. At the commencement of the 8 administration, their subjective view will determine 9 whether tax is to be deducted or not and as I understand 10 the argument, that's conclusive as against the Revenue, 11 so the Revenue can't come along and say "You've got it 12 wrong. You decided it was all going to be short 13 interest. You paid out in years 3, 4, 5 and 6 and all 14 the rest of it but we're stuck because that was your 15 subjective intention". It cannot have been intended 16 within the terms of the administration, that that is the 17 result.</p> <p>18 Again, the whole basis of that argument is 19 apparently by analogy to the case of Cairns v 20 MacDiarmid, the situation of individuals entering into 21 a contract. As we've said in our skeleton in opening, 22 that's not the situation here. That's relevant for 23 determining what they've contractually agreed. The 24 administrators haven't, as regards statutory interest, 25 they haven't agreed the terms of Rule 288(7). They</p> <p style="text-align: center;">Page 175</p>
<p>1 the starting point is when you identify the surplus. 2 That's in this particular case, at least six years after 3 the commencement of the administration.</p> <p>4 The alternative argument says "Oh, well, let's 5 abandon all that and let's go to the other end of the 6 process and look at the matter of intention as at the 7 start of the administrative period".</p> <p>8 I don't know whose intention it is supposed to be, 9 but apparently it is the subjective intention, I think 10 my learned friend was saying, of the joint 11 administrators. So they are going to have to take 12 a decision -- let's leave aside this case and think 13 about a case where it may be that monies could be 14 realised within the year. They might be a little bit 15 more than a year or whatever. But apparently, on my 16 learned friend's submissions, their subjective intention 17 at that particular moment of time will determine and 18 apparently, as I understand it, determine conclusively 19 as against the Inland Revenue Commissioners, apparently, 20 I think he's got to say, as to whether it is yearly 21 interest or not and whether tax should be deducted or 22 not.</p> <p>23 Well, who on earth would have thought that in this 24 day and age, we would actually get to a regime for the 25 deduction of tax that is determined by the subjective</p> <p style="text-align: center;">Page 174</p>	<p>1 haven't agreed any of the rules of the legislation. It 2 is Parliament that has laid them down and therefore it 3 is the intention of Parliament and as I've said, there 4 is nothing in the legislation whatsoever that possibly 5 suggests that this was intended to be long-term or 6 yearly interest. And, indeed, if and insofar as one can 7 look at any kind of indication at all, it is plain that 8 the ordinary administration was intended by Parliament 9 to be undertaken within a year, which if anything, 10 therefore, would suggest to the contrary.</p> <p>11 I am conscious, I think, my Lord, that if and 12 insofar as I am going to say anything more, I am 13 probably going to be repeating anything I've already 14 said. So unless there is actually anything that 15 your Lordship really wants to put to me, I don't think 16 I can add to the submissions I made in opening and the 17 very short observations I've just made.</p> <p>18 (Pause)</p> <p>19 MR JUSTICE HILDYARD: I have two questions. One, with great 20 respect to you, Mr Gardiner, Mr Bayfield, is there 21 anything that I've said with respect to the notion of 22 the cut-off of claims with respect to interest, only in 23 that narrow -- that you wish to make any observations or 24 assistance to me on?</p> <p>25 MR BAYFIELD: The only observation is, of course, that one</p> <p style="text-align: center;">Page 176</p>

<p>1 of the things that was looked at in Waterfall I was</p> <p>2 currency conversion claims. In Waterfall IIA, the judge</p> <p>3 was also looking at the possibility of there being</p> <p>4 a non-provable liability in relation to interest.</p> <p>5 There is, of course, a distinction between interest</p> <p>6 and other claims. It was established in Waterfall I and</p> <p>7 confirmed by the Court of Appeal that non-provable</p> <p>8 claims do exist in relation to currency conversion</p> <p>9 claims. But the point that was important in</p> <p>10 Waterfall IIA is that the Rule 288 is a complete code in</p> <p>11 relation to interest, such that there is no residual</p> <p>12 claim to interest that might be made as a non-provable</p> <p>13 claim. So, so long as what your Lordship was saying was</p> <p>14 limited to interest --</p> <p>15 MR JUSTICE HILDYARD: Yes.</p> <p>16 MR BAYFIELD: -- then what your Lordship was saying was</p> <p>17 absolutely right.</p> <p>18 MR JUSTICE HILDYARD: The general theory is that subject to</p> <p>19 the moratorium and the general collective, your debts in</p> <p>20 liquidation remain the same in nature, after as before.</p> <p>21 But in the case of interest, there is a very different</p> <p>22 regime, as I understand it.</p> <p>23 MR BAYFIELD: That's right. And what was accepted by the</p> <p>24 judge was that 288 occupies the field or is a complete</p> <p>25 code for interest and that's the way your Lordship put</p> <p style="text-align: center;">Page 177</p>	<p>1 between saying that:</p> <p>2 "The judgment decree of a different character in the</p> <p>3 context of a winding-up order pretty much ...(Reading to</p> <p>4 the words)... amongst themselves."</p> <p>5 Maybe that is just getting sort of -- identifying</p> <p>6 what a winding-up is, rather than any rights in it.</p> <p>7 I just don't know.</p> <p>8 I will ask you, Mr Goy, don't worry.</p> <p>9 MR BAYFIELD: I am rather keen not to speculate as to what</p> <p>10 might have been in the judge's mind when citing that.</p> <p>11 MR JUSTICE HILDYARD: Okay. I will put that aside, subject</p> <p>12 to Mr Goy telling me to take it up again.</p> <p>13 MR GOY: All I was going to say is taking your example of</p> <p>14 baggage, I say the example might be given of someone has</p> <p>15 a bag carrying interest. Administration starts and</p> <p>16 a bit of the baggage is taken out, but another something</p> <p>17 is put in in its place in the same baggage because the</p> <p>18 statutory interest is interest payable on those debts.</p> <p>19 I made the point earlier.</p> <p>20 MR GARDINER: My Lord, just one final point, perhaps related</p> <p>21 to that, I'm sorry -- I didn't respond to my learned</p> <p>22 friend's point about the contingency. Do you remember,</p> <p>23 he said there is a three-year loan and there is</p> <p>24 a contingent right that if there were some profits --</p> <p>25 I didn't respond to that and perhaps I should have done.</p> <p style="text-align: center;">Page 179</p>
<p>1 it.</p> <p>2 MR JUSTICE HILDYARD: Yes. I just wondered -- and either</p> <p>3 you or Mr Gardiner and I will ask if Mr Goy wants to</p> <p>4 comment at all on this -- but I was trying to work out</p> <p>5 David Richards J's thought processes more clearly and</p> <p>6 I wondered whether paragraph 113 in the Lehman case</p> <p>7 gave an insight into that.</p> <p>8 In the quotation from the Master of the Rolls,</p> <p>9 Lord Romilly in re Herefordshire Banking, where he some</p> <p>10 time ago, in 1867, draws a distinction between what</p> <p>11 I might call a right in the baggage and a right which</p> <p>12 simply exists for the benefit of all creditors in the</p> <p>13 liquidation, which is statutorily conferred.</p> <p>14 MR BAYFIELD: Yes. One way of testing that is with</p> <p>15 reference to the creditor who has no right to interest</p> <p>16 contractually or pursuant to a judgment, who is under</p> <p>17 Rule 288(7), entitled to interest at 8 per cent but had</p> <p>18 no pre-existing right to interest whatsoever. Of</p> <p>19 course, the rules have changed over the course of the</p> <p>20 last 200 years or less than that, in relation to which</p> <p>21 creditors are entitled to statutory interest and at</p> <p>22 which rate. But, of course, it is absolutely right that</p> <p>23 there are the two suitcases, because in relation to some</p> <p>24 creditors, suitcase 1 never existed.</p> <p>25 MR JUSTICE HILDYARD: I wondered whether that distinction</p> <p style="text-align: center;">Page 178</p>	<p>1 MR JUSTICE HILDYARD: Yes.</p> <p>2 MR GARDINER: If his example is in respect of profits that</p> <p>3 can only be determined to arise after the end of the</p> <p>4 three-year period, then that is actually the equivalent</p> <p>5 of this case, except that -- yes, it is the equivalent</p> <p>6 of this case, because it is looking at another factor</p> <p>7 giving rise to the creation of a sum of money, of</p> <p>8 interest after the end of the interest period. It is</p> <p>9 not actually an accrual on the debt, as it were.</p> <p>10 That's all I wanted to say about that.</p> <p>11 MR JUSTICE HILDYARD: Well, is that it?</p> <p>12 MR GARDINER: As far as I'm concerned, my Lord, yes.</p> <p>13 MR GOY: As far as I'm concerned, it is.</p> <p>14 MR JUSTICE HILDYARD: Well, thank you all very much. It is</p> <p>15 obviously an intriguing and complex issue, even if</p> <p>16 within a narrow compass. I will therefore reserve my</p> <p>17 judgment and let you know the result in due course.</p> <p>18 MR GARDINER: Much obliged.</p> <p>19 MR JUSTICE HILDYARD: I am very grateful to you all. Thank</p> <p>20 you very much.</p> <p>21 MR GARDINER: Thank you.</p> <p>22 (4.19 pm)</p> <p>23 (The court adjourned)</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 180</p>

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