IN THE HIGH COURT OF JUSTICE **NO 7942 of 2008**

CHANCERY DIVISION

COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N

(1) ANTHONY VICTOR LOMAS
(2) STEVEN ANTHONY PEARSON
(3) PAUL DAVID COPLEY
(4) RUSSELL DOWNS
(5) JULIAN GUY PARR
(THE JOINT ADMINISTRATORS OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION))

Applicants

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

SKELETON ARGUMENT FOR THE RESPONDENTS

INTRODUCTION

1. Lehman Brothers International (Europe) ("**LBIE**") has been in administration since 15 September 2008. There is a surplus in the administration which is to be used, amongst other things, to pay statutory interest to creditors under the provisions of Insolvency Rule 2.88(7). The question arising in these proceedings

is whether such interest, when paid, will rank as "yearly interest" for the purposes of section 874 Income Tax Act 2007 ("**ITA 2007**"). If it does the Applicants will be required, subject to specific statutory exceptions applying, to deduct basic rate income tax from the payments made and account for the same to the Respondents. If the interest is not "yearly interest" no such obligation will exist and, payments will be made gross.

2. The interest in question is interest that will be payable in respect of a period running from the date of commencement of the administration in 2008 to the time of payment of the debts proved in the administration. This will be interest payable in respect of a period in excess of a year and, in the Respondents' submission, will therefore be yearly interest in respect of which the obligation to deduct tax under s.874(2) will exist (as opposed to short interest, in relation to which no such obligation would arise).

3. Whether or not the statutory interest in question is "yearly interest" is not a question that has previously come before the courts. Most, but not all, of the cases concerning the question whether interest is "yearly" interest, have been concerned with whether contractual interest payable in respect of loans or other contractual debt is yearly interest. These cases can provide only limited guidance as to how the statutory interest payable in the present case should be treated. There are cases however which have considered whether interest payable in similar circumstances to the present rank as "yearly" interest. These cases support the Respondents' claim.

4. Section 874 provides as follows:-

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

It is clear that this provision is intended to provide security to the Crown for the recovery of tax. Where it applies (and there are many exceptions where the obligation to deduct tax does not exist even though the interest is yearly) the person required to deduct tax must account for the same to HMRC (see chapter 15 of Part 15 ITA 2007). The further significance of tax being deducted at source is explained in the Annex hereto.

The nature of the statutory interest

5. Rule 2.88(7), in the form in which it applies to LBIE[1], provides that,

[1] IR 2.88 was amended by the provisions of SI 2010/686, subject to transitional provisions which provided that such amendments only apply where the relevant company entered administration on or after 6 April 2010.

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

The rate of interest which is payable under IR 2.88(7) is, as prescribed by IR 2.88(6) and (9), whichever is the greater of (i) the rate specified in section 17 of the Judgments Act 1838 on the date when the company entered administration or (ii) the rate applicable to the debt apart from the administration. (As at the date LBIE entered administration, and now, section 17 of the Judgments Act 1838 prescribes a rate of interest of "*8 points per centum per annum*".)

6. The nature of the interest payable is summarised by David Richards J (as he then was) in one of the LBIE cases (see [2015] EWHC 2269 (Ch) at para 149):-

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

7. When David Richards J says that the statutory interest is not a right *to the payment* of interest "accruing due from time to time" he can only mean that the right to any *payment* of such interest is contingent upon a surplus remaining after

payment of the proved debts and the extent of that surplus. But for such contingency the right to interest would "accrue due" over time.

8. David Richards J further makes clear that where interest is payable at a rate other than that under the Judgements Act, by virtue of the rate applicable to the debt otherwise being higher, such interest is not paid pursuant to the contract and remains statutory interest (see [2015] EWHC 2269 (Ch) at para 136). In addition he makes clear that interest payable in respect of contingent or future debts is payable also in respect of the period commencing on the start of the administration (supra at para 225).

The nature of yearly interest

9. It is not disputed in the present case that the statutory interest in question is "interest" for the purposes of tax legislation. Such treatment follows from the decision of the House of Lords in Westminster Bank Ltd v Riches [1947] AC 390 in which a sum of money awarded by the court under the powers conferred by s.3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 was held to be interest. Lord Wight said at p400:-

> "[T]he essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute or whether the money was due for any other reason in law."

10. The regime for the payment of statutory interest under rule 2.88 acknowledges that creditors will not be paid their proved debts in full for a period, which may be an extended period, after the commencement of the insolvency process (see [2015] EWHC 2269 (Ch) at para 152). The interest payable is compensation for such delay. On the basis of the approach in Riches it clearly constitutes "interest" for tax purposes.

11. As regards the concept of "yearly interest", it is not defined in the relevant tax legislation. There are however a variety of authorities that cast light on its meaning. Most of these cases involve loans where interest is payable under the terms of such loans.

12. In Bebb v Bunny [1854] 1 K&J 216 the Vice Chancellor considered whether a purchaser liable to pay interest to the vendor could deduct income tax from such payment. The court said:-

> "The whole difficulty is in the expression "yearly" interest of money; but I think it susceptible of this view, that it is interest reserved, at a given rate per cent. per annum; or, at least, in the construction of this Act, I must hold that any interest which may be or become payable de anno in annum, though accruing de die in diem, is within the 40th section."
>
> [emphasis added]

13. Bebb v Bunny may be contrasted with Goslings & Sharpe v Blake 2 TC 450 in which the Court of Appeal held that interest on a banker's loan for a specified time less than a year (in that case 3 months), although expressed as being a percentage rate 'per annum', did not constitute yearly interest. Bowen LJ said as follows at p456:-

> "We are dealing in this case only with short loans, that is to say, with loans made for a period short of one year, loans which are not intended to be continued, and are not continued, for a long period. The question is whether the interest in such a case, where the interest has to be paid at the expiration of the short period, is yearly interest of money within section 40. It seems to me it is not yearly interest at all; it is not calculated with reference to a year in any sense, although it is true that is expressed in a notation which is borrowed from the language of cases where there are yearly loans, or where the interest is calculated by the year. It is convenient to express in that notation the amount of interest that has to be paid, but it is not calculated on a year, nor on the supposition that the loan would last for a year, therefore it is not yearly interest when the loan does not last beyond the short period, and the interest does not run over it. When it runs over, then the interest becomes calculable during the time it runs over it, it becomes calculable with reference to the time it is outstanding, and with reference to a year, and the case may be different there."
>
> [emphasis added]

14. The upshot of the decisions in the above two cases is that interest is yearly interest if it is payable in respect of a debt that will or may exist for a year or more. In such cases the interest can be said to be calculated and payable by reference to a period of a year or more. The position in this respect is confirmed by what Warrington J said in Re Craven's Mortgage [1907] 2 Ch 448. He refers to Bebb v Bunny (supra) and says (at p457):-

> "It has been argued that when the Vice-Chancellor says 'payable de anno in annum' he means to confine his judgment to cases where the interest has to be paid at the end of yearly periods; but he plainly cannot mean that, for interest on purchase money is not payable from year to year, but when the purchase money is paid on actual completion. I think he means interest which may become payable at a future date and is calculable by periods of not less than a year."
>
> [emphasis added]

What should be noted is that in both Goslings & Sharpe v Blake (supra) and Re Craven's Mortgage (supra) the emphasis of the Court is on whether the interest in question is calculated by reference to periods of a year or more.

15. In the context of bilateral or multi party arrangements reference is made to the intention of the parties to determine the period in respect of which it is anticipated that the interest is payable. Thus in Cairns v MacDiarmid [1983] STC 178 Sir J Donaldson MR said at p181:-

> "It is well settled that the difference between what is annual and what is short interest depends on the intention of the parties. Thus interest payable on a mortgage providing for repayment of the money after six months, or indeed a shorter period, will still be annual interest if calculated at a yearly rate and if the intention of the parties is that it may have to be paid from year to year (Bebb v Bunny (1854) 1 K&J 216, 69 ER 436 and Corinthium Securities Ltd v Cato (Inspector of Taxes) [1969] 3 All ER 1168, 46 TC 93)."

No reference is made in such a case to the position of statutory interest being payable in a case such as the present, where the entitlement to payment of interest only happens on the occurrence of an event. Nevertheless the question remains – is the interest calculated and payable by reference to a period of a year or more?

16. In the contractual case the question of whether interest is "yearly" interest is looked at at the time the right to interest first arises. Whether the interest can be said to be calculated and payable by reference to a period of a year or more is determined by reference to the intentions of the parties regarding the length of the loan. Where interest is payable in circumstances such as the present, in which the right to interest when it arises relates to a period that is already past, the question of whether interest is calculated and payable by reference to a period of a year or more can be determined without reference to the intention of the parties. Reference can be made quite simply to the period in respect of which the interest is payable.

17. It is clear that the reference to "yearly" interest is not a reference to interest payable periodically. In this connection the following is relevant:-

i) this point was considered specifically in Re Craven's Mortgage (supra) where Warrington J, specifically states that it is immaterial whether interest is payable regularly or on a single occasion (see para 14 above):-

ii) the cases referred to in para 18 below all involved situations where interest was payable on a single occasion – in all such cases the interest was held to be "yearly interest".

iii) it would be odd in the extreme if the obligations of a taxpayer to deduct tax under s.874 could be defeated by interest being payable on a single occasion (say at the end of a 3 year loan) rather than annually during the period while the loan subsists.

18. There have been a number of cases which support the Respondents' approach:-

(a) Barlow v CIR 21 TC 354. A trustee acted in breach of trust and to compensate the trust he covenanted by deed in 1930 to pay a principal sum and interest on such sum from 1923, the time of the breach, until the date of the deed. Entitlement to the interest only arose as from the date of the deed. Finlay J held the interest to be yearly interest.

(b) Regal (Hastings) Limited v Gulliver (1944) ATC 297. The directors in that case, profiting from their fiduciary position were required to account for the profit made and pay interest in respect of the period commencing when the profit accrued in 1935 to the time of payment in 1942. Cassels J considered the interest to be yearly interest. He said at p299:-

> "I have to deal with the facts of this case where the House of Lords has held in 1942 that the defendants, the directors, are to be treated as having had, each of them, since 1935, the sums of £1,402 in trust for the plaintiff, and that the directors must be taken to have invested it at the moment they received it and, therefore, must pay interest from that moment to the time 6 ½ years later, when the House of Lords declared the defendants liable. I think these facts distinguish this case from such a case as Gosling and Sharpe v Blake [ref.] which dealt with bankers' short loans."

(c) Jefford v Gee [1970] 2 QB 130. The case concerned the payment of interest in personal injury cases under the Law Reform (Miscellaneous Provisions) Act 1934. As to the tax treatment of such interest Denning MR said as follows at 149C-E:-

> "When the court awards interest on debt or damages for two, three or four years, the interest is subject to tax because it is "yearly interest of money": see Riches v Westminster Bank Ltd [ref.]. Furthermore, seeing that all the interest is received in one year, then, although it may cover two, three or four years' interest, nevertheless, the whole of it comes into charge for tax in the one year in which it is received. This may operate very hardly in those cases where this big sum changes the rate of tax: as for instance, a low taxpayer is brought into a higher rate – or a high taxpayer has to pay much of it away in surtax. But that cannot be helped. The tax man must collect all he can.
>
> There are special statutory provisions about deducting tax. For instance, if the person who pays the interest is a company or a local authority, it must deduct tax and make the payment of interest net of tax: see s.26 of the Finance Act 1969. But, if the person paying is an individual, he must pay the interest as a gross sum, leaving the plaintiff to pay the tax. We do not think that the courts, when awarding interest should get involved in such questions. Interest should be computed and awarded as a gross sum payable by a defendant, leaving him to work out whether he should deduct tax or not."

19. The above cases are all concerned with interest being payable in a lump sum on the happening of a particular event (ie the entering into a deed in Barlow, or the making of a court order in Regal (Hastings) and Jefford v Gee[2]). Prior to such event occurring there was no entitlement to *payment* of interest. The position in this regard is similar to that in the present case where entitlement to payment of interest only arises if and to the extent that there is a surplus in the administration. In all the three cases referred to the court simply looked at the period in respect of which the interest was payable. So long as that was at least a year the interest was yearly interest. It was interest "calculable by periods of not less than a year" (per Warrington J in Re Craven's Mortgage (supra)).

20. The Respondents understand the Applicants' position to be that in order for interest to be yearly interest it must be interest that accrues due over a period while the creditors' debts are unpaid. This is understood to refer to a case where it can be said that as time passes an unconditional entitlement to interest exists and increases. It is said that the interest in the present case is payable only if and when a surplus in the administration arises and that therefore it does not accrue due over a period.

21. As to this argument the Respondents make the following points:-

[2] In both Regal (Hastings) and Jefford v Gee, the relevant yearly interest was awarded by the Court pursuant to a discretionary jurisdiction; namely section 3 of the Law Reform (Miscellaneous Provisions) Act 1934.

i) There is no authority supporting the Applicants' submission. The position is quite the contrary. In all of the cases referred to in para 18 above, the courts concluded that interest was "yearly" despite none of the interest accruing in the strict sense apparently favoured by the Applicants. Indeed, in both Regal (Hastings) and Jefford v Gee no interest could be said to fall due unless and until the Court exercised its discretionary jurisdiction to make such an award; it was nevertheless "*yearly interest*" in circumstances where the relevant period which it subsequently compensated for was at least a year.

ii) Accrual over a period is an ordinary feature of interest but is not a requirement that must be satisfied before something is interest. Likewise accrual over a period of a year or more is an ordinary feature of yearly interest but it is not a requirement that this must be the case.

The argument put is similar to that put in Westminster Bank Ltd v Riches (supra) in which it was claimed that the payment in question lacked the appropriate element of recurrence for the interest to be interest for tax purposes. The argument failed. Lord Wright said at p191:

> "It was said that the sum in question could not be interest at all because interest implies a recurrence of periodical accretions, whereas this sum came into existence uno flatu by the judgment of the court and was fixed once and for all. But in truth it represented the total of the periodical accretions of interest during the whole time in which payment of the debt was withheld. The sum awarded was the summation of the total of all the recurring interest items."

If the Applicants are correct in their argument it would mean that the feature on which they rely, while not good enough to preclude the payment being interest, is somehow good enough to prevent it being yearly interest.

iii) If there is no accrual in the present case it can only be because of the contingent nature of the entitlement to receive payment of the interest. It is submitted that the difference between the payment of interest being unconditional or contingent is too fine to cause the nature of the interest to differ in each case (as the cases of Regal (Hastings) Limited v Gulliver and Jefford v Gee confirm). Similarly, if money were lent to a company for a number of years with interest only being payable if profits arose it would be surprising if the contingent nature of the entitlement to interest precluded it from being "yearly".

In the Respondents' submission, the Applicants' argument elevates an ordinary feature of both interest and yearly interest into a requirement that must be satisfied, not for the interest to be interest for tax purposes, but for it to be yearly interest. There is no support for such an argument nor is there sense in it.

The preferred approach

22. In the Respondents' submission the answer to the question raised in the present case is straightforward. The statutory interest payable is calculated and payable in respect of periods in excess of a year, commencing at the time of the commencement of the administration. It is therefore yearly interest. In this connection, it should be noted that HMRC accept that it does not follow that all statutory interest payable under rule 2.88 will inevitably be "yearly": If such interest is paid within a year of the commencement of an administration it will not be.

The alternative approach

23. The Respondents' submission is that as the interest in question is payable in respect of periods in excess of a year it is yearly interest. The position is looked at as at the time an unconditional entitlement to interest first arose (i.e. as at the time all the proved debts were repaid in full).

24. The approach of the courts in the context of contractual arrangements is understandably to look at the position prospectively from the time the right to any interest first accrues. The question is whether the indebtedness in respect of which the interest is or may be payable will or may exist for a year or more. Such an approach is correct because the interest in question will be payable in respect of future periods.

25. As said above (see para 16), the present case is different because when the entitlement to payment of interest arises it is in respect of a past period. There is no reason to look at the position prospectively because the period in respect of which the interest is payable is clear and finite. The interest will not be payable in respect of any period in the future and thus the future has no relevance.

26. If, contrary to our primary submission, some form of prospective test needs to be satisfied, we submit that such an approach can be applied in the present case looking at the position at the time of commencement of the administration. At that time a contingent right to the statutory interest came into existence. Looking at the position as at that time the question is whether the debts in question were likely to go unpaid for a year or more and thus whether any interest ultimately payable would be payable in respect of a period of a year or more.

The length of the administration

27. Provisions concerning the length of an administration are contained in paragraphs 76-86 of Schedule B1 to the Insolvency Act 1986. In this connection paragraph 76(1) provides that the appointment of an administrator is to cease to have effect one year after the appointment. However, this is subject to paragraph 76(2) which provides that on the application of the administrator the court may by order, extend his term of office for a specified period and that an administrator's term of office may also be extended for a specified period not

exceeding 6 months by appropriate creditor consent[3]. (Paragraph 77 of Schedule B1 further provides that such an order may be made in respect of an administrator whose term of office has already been extended by order or by consent; there is no limit to the number of successive extensions that may be granted.)

28. It is reasonable to believe that anyone with knowledge of the business of LBIE would have anticipated that the administration would have taken considerably more than one year to complete (see the witness statement of Nicola Rass "NLR" paras 14 to 17 and Exhibit NLR1). In the event, the administration of LBIE has lasted over 7 years. The administration was initially extended by two years until 30 November 2011 (see Exhibit NLR1 p144) and subsequently by five years until 30 November 2016 (see Exhibit NLR1 p193). Dividends in respect of admitted unsecured creditors' claims only began to be paid in late 2012 (see [2015] EWHC 2269 (Ch) at paras 6-7).

29. In the circumstances, the Respondents' case is that there was no practical possibility of the administration being completed within a year nor that the company's proved debts would be repaid in full within that period. Certainly, and at the very least, the possibility of the administration extending beyond a year would have been apparent to anyone who gave any thought to the position. The yearly nature of the statutory interest can be no different however, whether

[3] Paragraph 78 of Schedule B1 addresses what is required by way of such consent.

thought was given to the point or not, in circumstances such as the present where the prospect of the length of the administration would have been apparent had consideration been given to the matter.

30. Moreover, the authorities indicate that even in the contractual context interest will be "yearly" interest even though there is no certainty that the indebtedness by reference to which the interest is payable will necessarily subsist for more than a year. Thus Donaldson MR said in Cairns v MacDairmid (supra) at p181:-

> "Thus interest payable on a mortgage providing for repayment of the money after six months, or indeed a shorter period, will still be annual interest if calculated at a yearly rate, and if the intention of the parties is that it may have to be paid from year to year."
>
> [emphasis added]

Even if therefore there was no certainty that the administration would have continued beyond a year and that the relevant debts would be repaid only after a year, the possibility that this *might* occur would mean that the interest would be "yearly" interest.

31. Authorities also indicate that where a debt is repayable on demand and there is no agreement for any continued forbearance, any interest payable in respect of such debt would not be "yearly" interest. Such was the position in Mayor. &c., of Gateshead v Lumsden [1914] 2 KB 883 which concerned a statutory debt in respect of which the plaintiffs had power to allow time for repayment of the debt subject to the payment of interest. The interest was held not to be "yearly" interest. Nevertheless, Lord Sumner in the Court of Appeal accepted that the

position might have been different had the plaintiff followed a regular practice of allowing time to pay. He said at p889:-

> "Whether or not the present case could have been brought into line with the mortgage cases if it had been shewn by the evidence that the corporation followed a regular practice of investing their funds by allowing time to the frontagers for payment of the principal moneys due from them with interest it is unnecessary to consider. It is sufficient for the purposes of this case to say that no such facts are shewn here."

Even more obvious than the position contemplated by Lord Sumner, is the case where there is an actual agreement allowing time to pay or, as here, an enforced period of forbearance. In such circumstances the interest subsequently payable would be yearly interest, assuming either that the parties agreed to allow deferral of payment for more than a year or that the enforced period of forbearance was envisaged or likely to last for more than a year. In the present case there was no relevant agreement between the parties but nevertheless the effect of the company going into administration is that there was (and is) an effective moratorium on the ability of the company's creditors to pursue payment of the company's debts.

32. The terms of the relevant statutory moratorium are contained in paragraphs 42 to 43 of Schedule BI to the Insolvency Act. In particular, paragraph 43(6) provides that where a company is in administration:-

> "No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except –
>
> (a) with the consent of the administrator, or
>
> (b) with the permission of the court."

33. In effect, the result of a company going into administration is for a creditor to be precluded from taking action for recovery of his debt (save in the exceptional cases referred to). For the reasons identified above, such moratorium can in the present case reasonably have been anticipated to last well beyond a year, or at the very least, there was a distinct possibility that this would be the case. Such moratorium has a similar effect to an agreement between parties to a debt agreeing to delay repayment for a year or more. Interest payable in respect of such a debt would be yearly interest as interest payable in the present case falls to be so treated.

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ANNEX

As regards residents of the UK the system of deduction of tax at source provides security to HMRC for the collection of tax.

As regards non-resident recipients of yearly interest the existence of an obligation to deduct tax also affects the obligation of such persons to pay tax. In broad terms the effect of sections 811 (read with s.813 and s.825) ITA 2007 and section 815 (read with s.816 and s.825) ITA 2007 results in such income not being taxable unless tax is deducted at source.

It should be noted that non-residents who receive yearly interest subject to deduction of tax at source may have their ultimate liability affected by the terms of an applicable double tax treaty. Treaties commonly give the taxing right in respect of interest in whole or in part to the place of residence of the recipient. In these circumstances any tax deducted may have to be repaid by HMRC in whole or in part, upon the making of a claim under the relevant treaty. Where there is no applicable double tax treaty the liability of the non-resident will depend, in effect upon whether income tax is deducted at source.

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